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Supreme Court, U.S.
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In The

Supreme Court of the United States

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CHRISTO BARDIS, et al.,

Petitioners,

v.

MARVIN L. OATES, et al.,

Respondents.

◆

On Petition For Writ Of Certiorari
To The Court Of Appeal
Of The State Of California

◆

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court's decision in *State Farm Mutual Insurance Co. v. Campbell* (2003) 538 U.S. 408 (*Campbell*) overrule *TXO Production v. Alliance Resources* (1993) 509 U.S. 443 (*TXO*) thereby constitutionally prohibiting a double-digit ratio of punitive damages to compensatory damages in cases where the harm was economic; not physical; the tortious conduct did not constitute a reckless disregard of the health or safety of others and the target of the conduct was not financially vulnerable?

2. Does the case of an enormously wealthy fiduciary, who defrauded his partners on multiple occasions with actual malice, shows no remorse for his actions and attempts to obstruct justice by giving false testimony, provide the basis for another exception to *Campbell's* three express exceptions to the prohibition against double-digit ratios?

PARTIES TO THE PROCEEDINGS

CHRISTO BARDIS,
Petitioner.

LLOYD and NANCY ARNOLD, a limited partnership,
Petitioner.

MARVIN L. OATES,
Defendant in underlying action.

A & A PROPERTIES, a California corporation,
Defendant in underlying action.

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BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeal of the State of California for the Third Appellate District filed its opinion on May 28, 2004. Appendix 1. Petitioners petitioned the Third Appellate District for a rehearing. Appendix 47-73. The petition for rehearing was denied on June 15, 2004. Appendix 45. On July 6, 2004, Petitioner timely filed a Petition for Review before the California Supreme Court. Appendix 75-110. The California Supreme Court denied Petitioner's petition on September 15, 2004. Appendix 46. The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this court.

This court has jurisdiction under 28 U.S.C. § 1257(a) to review on a Writ of Certiorari the judgment of the Court of Appeal of the State of California for the Third Appellate District involving the application of the due process clause of the 14th Amendment of the United States Constitution.

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CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Constitution of the United States, Amendment 14, Due Process Clause.

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STATEMENT OF THE CASE

Defendant Marvin L. Oates (Oates) is a successful real estate developer who controls a family of satellite companies. These include a real estate brokerage firm, Buzz Oates Real Estate Company (BORE), a management firm known as A & A Properties (A & A) and a construction company known as Buzz Oates Enterprises II (BOE II). Appendix 2-3.

Plaintiff Christo Bardis (Bardis) is also a real estate developer who, together with Lloyd Arnold (Arnold), entered into a partnership with Oates and another individual, Frank Ramos (Ramos), to purchase a 300-acre tract of land in Orange County consisting of a horse racetrack, golf course and industrial area. Appendix 3. Bardis managed the partnership from 1989 to 1994 when Oates took over as manager. Appendix 4. The original partnership dissolved in 1997 and a tenancy in common (TIC) was formed with Bardis and Arnold taking certain parcels of land, Oates and Ramos taking other parcels and the TIC retaining the remaining parcels. Appendix 4.

A. MARKUP SCHEME

The TIC agreement provided that the managing partner, Oates, would receive a $500-per-month fee for managing the property. Appendix 5. Not satisfied with the terms of the TIC agreement, Oates devised a markup scheme in which he had A & A receive the TIC's vendor invoices and instead of paying them directly from the TIC's account, A & A would tender them to BOE II, a division of A & A, which unilaterally and secretly marked up the invoices by 5% or more. The markup for services of an engineering consultant and a contract attorney were

100% and 50% respectively. Oates concealed these markups from Bardis and Arnold. Appendix 6. BOE II was used by Oates as a dummy middleman to mark up the invoices so that instead of the TIC paying the actual face value of the invoices, it was charged a secret markup which was funneled to BOE II, an Oates controlled company. Appendix 12. The Court of Appeal determined that "[t]he jury could find that the markups were part of a systematic pattern by Oates of bilking his partners out of funds legitimately belonging to the partnership. He repeatedly fleeced the partnership to line his own pockets." Appendix 28.

The jury unanimously found both defendants (Oates and A&A) liable for intentional breach of fiduciary duty and Oates liable for breach of contract for the markups. Appendix 9.

B. THE EWING COMMISSION KICKBACK

The Partnership and TIC Agreements do not provide for any compensation to the manager except as approved by unanimous vote of the partners with the exception of the TIC $500 management fee. Appendix 4, 5. Moreover, Bardis had made it abundantly clear that neither Oates nor BORE were to receive a realtor's commission on the sale of TIC properties. Appendix 6.

A prospective buyer for the parcel owned by the TIC contacted BORE. Appendix 6, 7, 145-148. Although no broker represented the buyer, BORE entered into an agreement with CB Commercial (CBC) to provide a commission on the sale to CBC, who had not procured the buyer, with the understanding that BORE would get a 60% kickback of the commission from CBC. Appendix 7.

The sale documentation deliberately concealed the kickback arrangement between CBC and BORE from the TIC partners since it provided that CBC would receive the entire commission. Appendix 7. The kickback commission was deliberately concealed in all documentation for the purpose of deceiving Bardis and Arnold. Appendix 7. BORE's manager, Kevin Ramos, testified to intentionally misrepresenting the terms of the commission to Bardis and Arnold. Appendix 7.

After the transaction closed, CBC sent a check for $122,090 to BORE which was the kickback. Appendix 7. In order to obtain the $122,090 kickback, Oates gave CBC a commission of $81,394 that they were not entitled to since CBC had not procured the buyer. Appendix 7.

The jury unanimously found the defendants liable for intentional breach of fiduciary duty, intentional interference with economic advantage, intentional misrepresentation and fraudulent concealment on this transaction. Appendix 9.

C. COTTONWOOD COMMISSION SCAM

Later, the last remaining parcel of TIC property was sold to the Cottonwood Christian Center (Cottonwood). The Cottonwood offer included not only the TIC owned Parcel 3 but also adjacent Parcels 4, 5 and 6 which were owned by Ramos and Oates. Appendix 8. In this transaction the buyer, Cottonwood, was represented by its own realtor and CBC represented the sellers TIC, Ramos and Oates. Appendix 7-8.

Initially, the commission was to be paid prorata by the owners of all of the four parcels with CBC and BORE each receiving 1%. However, Kevin Ramos of BORE knew that there would be a problem with Bardis if BORE received any commission on the TIC property. Appendix 8. Accordingly, Ramos renegotiated the commission with CBC so that CBC received a 2% seller's commission on Parcel 3 and BORE received a 2% seller's commission on Parcels 4, 5 and 6. The net effect was to shift the obligation to pay CBC's commission from being prorated among the owners of all four parcels to the TIC exclusively while BORE received its full commission from the Oates-Ramos parcels. Appendix 8, 9. CBC, who was entitled to a commission on Parcels 4, 5 and 6 received a larger commission from the TIC for the sale of Parcel 3 and no commission from Oates and Ramos, the owners of Parcels 4, 5 and 6.

Had Bardis known about the secret deal he would have vetoed the sale. Appendix 8, 9. The net effect of the commission split was to place an unequal burden on the TIC partners while allowing Oates to avoid paying any commission to CBC on the sale of the three parcels he co-owned with Ramos. Appendix 17, 18.

The jury found defendants liable for intentional interference with economic advantage, intentional misrepresentation, fraudulent concealment and intentional breach of fiduciary duty on this transaction. Appendix 9.

D. REPREHENSIBILITY

1. OATES' SYSTEMATIC PATTERN OF FRAUDULENTLY BILKING HIS PARTNERS.

The Court of Appeal's opinion states that "[t]he jury could find that the kickbacks, markups and concealed commissions were part of the systematic pattern by Oates of bilking his partners of funds legitimately belonging to the partnership." Appendix 28. The Court concluded that "[t]he record also overwhelmingly supports a finding that the harm was caused as the result of intentional fraud, malice and deceit." Appendix 28. And that "[t]he jury verdict leaves no doubt that Oates committed egregious misconduct." Appendix 31.

2. OATES UNREPENTANT AT TRIAL

The Court of Appeal also concluded that Oates "repeatedly fleeced the partnership to line his own pockets. Oates was unrepentant at trial, insisting that 'in [his] heart' he believed he did nothing wrong." Appendix 28.

3. OATES HARBORED ACTUAL MALICE TOWARD BARDIS

In a meeting held in late 1997, tension between Oates and Bardis escalated to a level in which they screamed profanities at each other, causing Oates to stomp out of his own office. Since that explosive meeting, Oates and Bardis have not spoken to one another. Appendix 115-117, 126-127, 131-133.

The fraudulent concealments, intentional breaches of fiduciary duties and other torts found by the jury in the Ewing commission kickback and the Cottonwood commission all occurred after the 1997 meeting (Ewing sale 1998.) Appendix 149. (Cottonwood sale 1999.) Appendix 150.

In one incident, Bardis, along with his niece and nephew, happened to walk past Oates and his companions who were seated at a table in a Sacramento restaurant. Loud enough for all to hear, Oates called Bardis the "biggest asshole in town." Appendix 126-129, 136-139. In another episode in a beauty salon, within earshot of Bardis's niece and others, Oates again reiterated that Bardis was the "biggest asshole in town." Appendix 136-138.

4. OATES' ATTEMPTS TO OBSTRUCT JUSTICE

The defense theme was that BOE II was a service organization that enabled Oates to build buildings for his partnerships at the lowest cost; that it was never intended to make a profit and that it never made a profit. Appendix 112-115, 118-120. Oates claimed that the markups merely reimbursed BOE II for overhead costs. Appendix 12, 118-120. The Court of Appeal dismissed this claim stating Oates' "self-serving, post hoc explanation that he was reimbursing himself for 'overhead' was entitled to, and received, no weight by the jury." Appendix 14.

In the punitive damages trial, Oates was required to produce his financial statements. Appendix 140-143. Those financial statements told an astonishing story. Rather than being a profitless corporation with the markups barely paying the overhead, BOE II had a net income of $10,495,457 in 2000 and a net income of $9,717,465 in 2001. Appendix 151-156.

E. THE COURT OF APPEAL'S REDUCTION OF PUNITIVE DAMAGE AWARD

The Court of Appeal expressly felt constrained by *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408 to restrict the punitive damage award to a single-digit ratio of punitive damages to compensatory damages. Appendix 29. The Court of Appeal, interpreted *Campbell* to hold that only a single-digit ratio will satisfy due process, subject only to three exceptions set forth therein. Appendix 29. In reviewing the instant case, the Court of Appeal concluded that none of these exceptions applied. Appendix 29-31.

Oates' net worth was between $600 million to $800 million. Forbes Magazine ranked him 288th on a list of the nation's 400 wealthiest individuals, estimating his worth at $800 million. Oates claims he told Forbes he was worth only $600 million to $650 million. Appendix 28-29, fn. 9.

The jury award represents approximately 1% of Oates' worth. This award was affirmed by the trial court. The Court of Appeal considered that a 4 to 1 ratio would yield an award of only $660,000. Appendix 35-36. The court stated: "When compared to the magnitude of the misconduct, such a figure would be tantamount to a slap on the wrist." Appendix 35-36. The Court of Appeal reduced the punitive damage award from $7 million to $1.5 million, a ratio slightly exceeding 9 to 1, but within the single-digit barrier established in *Campbell*. Appendix 36. The $1.5 million punitive damage award represents less than 3/1,000ths (.003) of Oates' wealth.[1]

The federal question sought to be reviewed is the application of the due process clause of the Constitution to a case of actual malice by a fiduciary whose enormous wealth prevents the reduced punitive damage award from accomplishing its fundamental purpose: to punish and deter. Petitioners ask this court to grant this petition for a writ of certiorari to consider the issue of actual malice by a fiduciary who perpetrated multiple fraudulent schemes against his partners in the light of the societal function and goal of an award of punitive damages. Granting this petition will also allow this Court to clarify the uncertainty in the law as it exists now when the *Campbell* decision is contrasted with this Court's decision in *TXO Production v. Alliance Resources* (1993) 509 U.S. 443 (125 L.Ed.2d 366 (*TXO*),) where this Court affirmed a ratio of 526 to 1 in a case involving actual malice. This court needs to clarify the law as to whether *Campbell* has overruled *TXO* so that a double-digit ratio is prohibited by the due process clause, absent the applicability of one of the three express *Campbell* exceptions, or whether multiple fraudulent scams perpetrated by an enormously wealthy fiduciary with actual malice justify a fourth exception to the *Campbell* exceptions to the single-digit barrier.

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[1] This assumes Oates is only worth $600 million.

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ARGUMENT

The *Campbell* decision lists five factors utilized by the court in weighing reprehensibility. These factors include: "(1) the harm caused was physical as opposed to economic; (2) the tortious conduct evidenced an indifference to or the reckless disregard for the safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery or deceit, or mere accident." (*Campbell*, *supra*, 538 U.S. p. 419.)

Here, the Court of Appeal held that factor one was inapplicable because the harm caused was not physical but economic; factor two did not apply because the conduct did not evidence a reckless disregard of the health or safety of others and factor three did not apply since the plaintiffs were not financially vulnerable. Appendix 29-30. In reducing the punitive damage award, the Court of Appeal rationalized:

> As we understand the United States Supreme Court's teachings in *Gore* and *Campbell*, Plaintiff would have to 'run the table' on all three (sic)[2] evaluative factors in order to sustain a punitive damage award that significantly exceeds a single-digit ratio to the amount of compensatory damages. Appendix 34.

The Court of Appeal, interpreting *Campbell*, held that in the absence of any one of these five factors, only a single-digit ratio could pass constitutional muster, subject to three exceptions set forth in *Campbell*, namely:

1. A particularly egregious act has resulted in only a small amount of economic damages;

2. Where the injury is hard to detect; or

3. The monetary value of noneconomic harm may have been difficult to determine. Appendix 28. (*Campbell*, *supra*, 380 U.S. at p. 425.)

The Court of Appeal held, absent the three *Campbell* exceptions, no matter how reprehensible the defendant's conduct and no matter how wealthy the defendant, *Campbell* decreed that a double-digit ratio is in violation of the due process clause in cases not involving physical harm, a reckless disregard of the health and safety of others and where the victim was not financially vulnerable. This analysis is a reasonable interpretation of the *Campbell* decision.

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[2] This is believed to be a typographical error in the opinion. It should be the five evaluative factors *Campbell* used to weigh reprehensibility; not the three exceptions to the single-digit ratio barrier.

But such a limitation cannot accomplish the twin public policy goals of punishment and deterrence which is the rationale for the imposition of punitive damages. Certainly, deterrence "will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928. "An award which is so small that it can simply be written off as part of the cost of doing business would have no deterrent effect." (*Grimshaw v. Ford Motor Co.* (1981) 118 Cal.App.3d 757, 820.)

Here a single-digit multiplier would not comply with the Supreme Court's mandate in *BMW of North America, Inc. v. Gore* (1994) 517 U.S. 559 (*Gore*), that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that **strong medicine** is required to cure the defendant's disrespect for the law." (*Id.* at 576, 577.) (Emphasis added.)

Here, we have a fiduciary running amuck, defrauding his partners with actual malice. Here, the fiduciary is enormously wealthy. Here, the reduced award of punitive damages represents less than 3/1,000ths of the fiduciary's wealth. Such an award is not even a slap on the fiduciary's wrist, let alone strong medicine.

Consider a hypothetical defendant worth $10 million who committed the identical torts Oates perpetrated upon his partners. Applying the maximum constitutionally permissible ratio, the Court of Appeal believed *Campbell* mandated a maximum punitive damage award of only $30,000 (.003 times $10 million). This is obviously chump change to a defendant worth $10 million. But Oates's personal worth is 70 times greater than the $10 million hypothetical defendant. Here, the reduced $1.5 million punitive damage award is just as much chump change to Oates as the $30,000 punitive damage award would be to the $10 million hypothetical defendant.

In this era, rocked as it has been with scandal which has exposed respected fiduciaries blatantly cheating and deceiving their partners and shareholders, the single-digit barrier ratio to a punitive damage award in cases of only economic harm and where the target of the misconduct was not financially vulnerable is unacceptable. It is counterproductive to achieving punitive damages' public policy goals of punishment and deterrence.

To limit an award of punitive damages for actual malice and fraud against Oates to such a miniscule percentage of his wealth is not punishment to Oates and will not deter him or other similar financial predators. Such an award is merely a perfectly acceptable cost of doing business when defrauding one's partners is so profitable. Before *Campbell*, financial predators had the fear of getting caught since their potential exposure was to be tagged with a punitive damage award that would sting. This acted as a deterrent. With *Campbell*, the risk of getting caught no longer poses the danger of punishment and no longer acts as a deterrent.

Such a limitation on the award of punitive damages does not punish individuals of enormous wealth who commit fraud since the compensatory damages may be relatively small, but not small enough to fit within the

Campbell exception. Such an application of the due process clause will only discourage litigants and their attorneys from pursuing enormously wealthy individuals who have committed reprehensible fraud with actual malice.

The issue that needs to be clarified is whether *Campbell* has overruled *TXO*. In *TXO*, the defendant's reprehensibility is best illustrated by Justice Kennedy's concurring opinion:

> "There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: **TXO acted with malice**. This was not a case of negligence, strict liability, or respondeat superior. TXO was found to have committed, through its senior officers, the intentional tort of slander of title. The evidence at trial demonstrated that it acted, in the West Virginia Supreme Court of Appeals' words, through **a 'pattern and practice of fraud, trickery and deceit' and employed 'unsavory and malicious practices'** in the course of its business dealings with respondent. [Citations] [¶] But given the record here, I am satisfied that the jury's punitive damages award did not amount to an unfair, arbitrary or irrational seizure of TXO's property. *TXO*, *supra*, 509 U.S. at 468, 469. (Emphasis added.)

Accordingly, in 1993 Justice Kennedy, the author of the *Campbell* decision, concurred in affirming a punitive damage ratio of 526 times the actual damages.

In *Zhang v. American Gem Seafoods, Inc.* (9th Cir. 2003) 339 F.3d 1020, the Ninth Circuit recognized the critical significance of the degree of reprehensibility between the case before it and *Gore* and *Campbell*, stating:

> The gulf between the reprehensibility of the corporate defendants' actions here and the conduct at issue in *BMW*, *Copper Industries* and *State Farm*, however, is substantial. In *BMW*, the defendant automaker had fraudulently failed to disclose its practice of selling cars as new after repairing minor pre-delivery damage. [Citations] In *Cooper Industries*, the defendant had been found liable for falsely advertising another competitor's products as its own. [Citations] In *State Farm*, the defendant insurance company had implemented a fraudulent policy of limiting costs by refusing to settle insurance claims and then capping claims payments after losing at trial. [Citations] Although the plaintiffs in *State Farm* did allege emotional distress, [citations], the reprehensibility of the fraudulent business practices at issue in these Supreme Court cases is different in kind from the reprehensibility of intentional discrimination on the basis of race or ethnicity. (*Zhang*, *supra*, 339 F.3d at 1043.)

In this case, as in *Zhang*, the gulf between the reprehensibility of the defendants' conduct here and the conduct at issue in *Gore* and *Campbell* is substantial. In this case, as in *Zhang*, the reprehensibility here is different in kind from the conduct at issue in *Gore* and *Campbell*.

The corporate policy "frauds" in *Campbell* and *Gore* pale in comparison to the malicious conduct in this case that was perpetrated by a fiduciary upon his partners.

Review of the Court of Appeal's decision will allow this court to clarify the law on this crucial topic affecting litigants throughout the country. To constitutionally penetrate the *Campbell* single-digit barrier must there be, as the Court of Appeal interpreting *Campbell* held, physical harm, a reckless disregard for health and safety and a financially vulnerable victim?

Are there other exceptions to *Campbell's* single-digit maximum, such as here – a case of egregious fraudulent torts perpetrated by a fiduciary with actual malice on many occasions and in differing ways against his partners in which a single-digit ratio cannot accomplish the public policy purposes served by an award of punitive damages? Only this Court can clarify the law on this timely and controversial topic.

Petitioners respectfully request this Court grant a writ of certiorari to consider the important issues raised by this case.

Dated: December 13, 2004.

Respectfully submitted,

FREIDBERG & PARKER

EDWARD FREIDBERG,
Attorney for Petitioners

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CHRISTO BARDIS et al., Plaintiffs and Respondents, v. MARVIN L. OATES et al., Defendants and Appellants.	C043040 (Super. Ct. No. 01AS03250) (Filed 5/28/04)

APPEAL from a judgment of the Superior Court of Sacramento County, Lloyd A. Phillips, J. Affirmed as modified.

Howard Rice Nemerovski Canady Falk & Rabkin, Jerome B. Falk, Jr., San Francisco, Steven L. Mayer, Goleta, Long X. Do, San Francisco; Downey Brand, M. Max Steinheimer and Rhonda Cate Canby, Sacramento, for Defendants and Appellants.

Freidberg & Parker, Edward Freidberg, Sacramento, for Plaintiffs and Respondents.

In this case involving self-dealing, secret markups and clandestine commissions arising out of a real estate partnership, a jury awarded plaintiffs Christo Bardis and Lloyd and Nancy Arnold, a California limited partnership, $165,527.63 in compensatory damages and $7 million in punitive damages against defendants Marvin L. Oates and his corporation A & A Properties, a California corporation.

Defendants launch a twofold attack on the judgment: First, without contesting the factual underpinnings of the jury's finding that they committed fraud and breach of fiduciary duty, defendants claim that plaintiffs failed to show they were damaged, and therefore defendants were entitled to judgment as a matter of law. Second, assuming compensatory damages were properly assessed, defendants contend the punitive damages award was so grossly excessive that it must be vacated.

We find no error in the award of compensatory damages. However, in light of recent due process constraints laid down by the United States Supreme Court in *State Farm Mutual Insurance v. Campbell* (2003) 538 U.S. 408 [155 L.Ed.2d 585] (*Campbell*), we shall modify the punitive damages award from $7 million to $1.5 million, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

With a couple of notable exceptions, the facts of this case are not in dispute. We summarize the essential facts upon which the jury based its verdict.

The Parties

All of the parties are sophisticated real estate investors or entities. Most prominent among them, defendant Marvin "Buzz" Oates (Oates), is a successful real estate developer who owns and controls a family of satellite companies. These include defendant A & A Properties (hereafter A & A), which manages commercial property and also does business as a real estate brokerage under the name Buzz Oates Real Estate (hereafter BORE). BORE is managed and operated by Kevin Ramos (Kevin), son of Frank Ramos (Ramos), a longtime friend and business partner of Oates.

Another prominent entity in Oates's empire is a multipurpose construction company called Buzz Oates Enterprises II (BOE II). Oates owns a controlling interest in both A & A and BOE II, and manages their day-to-day operations.

Plaintiff Christo Bardis (Bardis) is a real estate developer who became a business associate of plaintiff Lloyd Arnold[1] in the 1980's when they were in the harness racing business together.

Acquisition of the Cypress Property

In 1989, Bardis and Arnold located an opportunity to purchase and develop a 300-acre tract of land in the Orange County town of Cypress, which included a horse racetrack, golf course and industrial area. The men believed they could buy the property at a distressed price for a fraction of its estimated potential value. Arnold spoke to Ramos about the deal. Both men thought that bringing the experienced Oates into the venture was a "natural fit."

Bardis, Arnold, Oates and Ramos ultimately formed a partnership to develop the property, which they called the Cypress Development General Partnership (Cypress partnership). The terms of the partnership were memorialized in a 29-page contract (partnership agreement).

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[1] Lloyd Arnold is the general partner of plaintiff Lloyd and Nancy Arnold Limited Partnership and signed partnership documents on its behalf (collectively referred to as Arnold).

The Cypress property was purchased for $71 million. Bardis managed the partnership from 1989 to 1994, when Oates took over as manager. By then, the partnership had sold enough of the tract to recover its investment and pay off its debt, while retaining 40-plus acres of commercial property which the partners expected to sell off in parcels at an enormous profit.

Dissolution of the Cypress Partnership and Formation of TIC

In 1997, the Cypress partnership dissolved and the partners distributed the remaining parcels. Bardis and Arnold took parcels 7, 8 and 9, while Oates, Ramos and an Oates-controlled entity named OBF received parcels 1, 4, 5 and 6. The four Cypress partners took title as tenants in common to parcels 2 and 3. With respect to parcels 2 and 3, the partnership agreement was replaced by a written tenancy in common (TIC) agreement.

The Cypress Partnership and TIC Agreements

Under the Cypress partnership agreement, all major decisions affecting the partnership were to be made by majority vote of the partners. The managing partner had primary responsibility for day-to-day management of the partnership business. In addition to his share of the profits, the managing partner was permitted to receive cash disbursements "as may, from time to time, be approved by unanimous vote of all Partners in order to defray any general office and additional expenses incurred by the Managing Partner in the administration of his duties." The partnership agreement further provided that if any partner or affiliate performed services for the partnership as an employee or independent contractor, he was to be compensated at the same rate as would be paid for providers of such services in the community. However, all expenses payable to the managing partner had to be approved by a majority vote of the partnership.

Unlike the Cypress partnership agreement, the 1997 TIC agreement disclaimed "any intention to create a partnership or joint venture." The agreement obligated each cotenant to pay the expenses arising from the property in proportion to his ownership share. It also authorized the "Lead Co-Tenant" to manage the properties and compensated him at the rate of $500 per month for carrying out such duties. Oates was designated as the "Lead Co-Tenant." As with the Cypress partnership, Oates utilized A & A to manage the TIC.

Management Fees

Despite the clause of the partnership agreement requiring a majority vote for any payment of compensation for services to the managing partner, during the time Oates was managing partner, A & A charged a fee of $500 per month for "managing" the Cypress properties. Oates admittedly never asked for a vote authorizing payment of the monthly fee. Although he acknowledged he lacked authority to charge the partnership a fee and was aware that Bardis had never charged for his time and efforts while he managed the property, Oates tried to justify the management fee at trial by asserting that it represented less than what it actually cost him to manage the Cypress tract.

The Markups

While managing the Cypress partnership and the TIC, A & A routinely received invoices from vendors. However, instead of paying the invoices directly, A & A tendered them to BOE II, a division of A & A, which marked up the invoices by five percent or more, and wrote a check for the marked-up amount from partnership funds. For example, a water bill for $97,673 for the partnership was submitted to BOE II; BOE II added a markup charge of $4,883 and charged the partnership $102,556 for the same bill. This practice was applied to bills of all sizes.

The markup percentages for the services of Bruce Kemp, an engineering consultant, and Gordon Egan, a contract attorney, were even steeper than those for routine bills: BOE II marked up Kemp's services by 100 percent, while the fee for Egan's services was marked up 50 percent.

Oates concealed the markups from Bardis and Arnold. At trial, he claimed the markups enabled A & A to recoup "overhead" costs. However, no one at A & A ever did an analysis to determine what the actual overhead costs were.

The Ewing Commission

In January 1998, Kemp brought to Kevin Ramos of BORE a prospective buyer for parcel 2 of the Cypress tract, Ewing Development Company (Ewing). Previously, Bardis had made it abundantly clear that he was not going to allow Oates or BORE to receive a realtor's commission on the sale of TIC properties.

Although no broker handled the transaction on behalf Ewing, Kevin associated Bob Goodmanson and his company CB Commercial (CB), whose offices were near the Cypress property, to handle the sale. Kevin and Goodmanson had a prior understanding that CB would help market the property and earn a share of any eventual commission earned by BORE.

On March 18, 1998, Kevin sent a memo to the four TIC owners, setting forth the terms of a proposed sale to Ewing. The memo recited that CB would receive a four percent commission. This recitation, according to Kevin's trial testimony, was an intentional misrepresentation. In fact, Kevin had secretly agreed to split the seller's commission with Goodmanson, so that BORE would get 60 percent of it and CB 40 percent. The commission split agreement was concealed for the purpose of deceiving Bardis.

All the TIC owners approved the sale to Ewing under the terms proposed by Kevin. The deliberately false statement that CB would receive the entire commission on the Ewing sale appeared on the written purchase agreement as well as the closing escrow statement.

CB received a four percent commission on the Ewing sale, or $203,484.44. It then sent BORE a check for the agreed-upon kickback in the amount of $122,090.

The Cottonwood Commission

In June 1999, the last remaining parcel of TIC property was sold to Cottonwood Christian Center (Cottonwood). However, the Cottonwood offer included not only

TIC-owned parcel 3, but also adjacent parcels 4, 5 and 6, which were owned by Ramos and Oates.

Goodmanson had procured Cottonwood as the buyer, which was represented by its own realtor, Cushman & Wakefield. Kevin recognized that Goodmanson's contribution toward the Cottonwood sale was at least equal to his own, and that the sale of parcels 3, 4, 5 and 6 was an indivisible transaction. Thus, he initially considered an agreement that called for the seller's commission on all four parcels to be split equally, one percent to CB and one percent to BORE. However, Kevin knew there would be a problem with Bardis if BORE received any commission on TIC property.

In order to avoid a conflict with Bardis that might affect the transaction, Kevin renegotiated the commission with CB and Goodmanson. The deal was restructured so that CB received a two percent seller's commission on parcel 3 and BORE received a two percent seller's commission on parcels 4, 5 and 6.[2] The net effect of the side agreement was to shift the obligation to pay CB's commission solely onto the TIC parcel, while BORE received its full commission from the Oates-Ramos parcels.

Although the sales agreement for parcel 3, signed by all TIC partners, showed a two percent seller's commission being paid to CB, plaintiffs were not told about the commission-shifting agreement between Kevin and Goodmanson.

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[2] The typewritten Cottonwood sales agreement recited that the commission on parcels 4, 5 and 6 was to be split between CB and BORE, with each receiving one percent. Just before closing, however, Kevin changed it by hand so that BORE got two percent and CB got nothing. Oates signed the agreement following this modification.

Had Bardis known about this secret deal, he would have vetoed the Cottonwood sale.

Jury Verdict and Posttrial Motions

Through a series of answers to special interrogatories, the jury found defendants in violation of both tort and contract duties as a result of each of the above-described transactions. The table below summarizes the jury's special findings in favor of plaintiffs as to each legal theory of relief:

TRANSACTION	**CAUSE OF ACTION – THEORY OF LIABILITY**
Ewing Commission	Intentional Interference with Economic Advantage, Intentional Misrepresentation, Fraudulent Concealment, Intentional Breach of Fiduciary Duty (Oates and A & A)
Cottonwood Commission	Intentional Interference with Economic Advantage, Intentional Misrepresentation, Fraudulent Concealment, Intentional Breach of Fiduciary Duty (Oates and A & A)
Markups of invoices and payment of invoices and management fees – Cypress Partnership	Intentional Breach of Fiduciary Duty (Oates and A & A)
Markups of invoices – TIC	Breach of Contract (Oates only)

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As a consequence of the above misconduct, the jury found that plaintiffs were damaged in the amount of $165,527.63.[3] The jury also found, by clear and convincing evidence, that Oates and A & A were guilty of malice, fraud and oppression. It awarded punitive damages of $5 million against Oates and $2 million against A & A.

Defendants' motion for new trial and motion for judgment notwithstanding the verdict were denied.

DISCUSSION

I. Compensatory Damages

Oates and A & A do not deny the operative facts underlying the jury's verdict. Their challenge to the compensatory damages award is not based on a claim that the acts (to which Oates refers as "mistakes") did not occur. Rather, defendants boldly assert that they "*did not cause Plaintiffs one penny of injury.*"

Damage to the plaintiff is, of course, an essential element to recovery in both tort (Civ.Code, §§ 3333, 3343) and contract (*id.,* § 3300) actions. However, on appeal, the judgment or verdict is presumed correct. (*Harris v. City of Compton* (1985) 172 Cal.App.3d 1, 9.) "[I]t follows . . . that the reviewing court must 'consider the evidence in the light *most favorable to the prevailing party,* giving him the benefit of *every reasonable inference,* and *resolving conflicts* in support of the judgment.' [Citation.] '[T]he power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.' (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429. . . .)" (*Ibid.*)

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[3] The jury also found in favor of plaintiffs and against Oates on all counts of his cross-complaint. On appeal Oates has not challenged the portion of the judgment that found against him on his cross-complaint.

With these principles in mind, we consider defendants' challenges to the compensatory damages award.

A. *Management Fees Paid to A&A*

Oates and A & A challenge the jury's finding regarding management fees, which Oates secretly charged to the Cypress partnership without authorization or vote of the partners.[4]

Claiming that the fees were "disclosed" on monthly financial reports issued to the partners, Oates concludes that the partners acquiesced to and/or ratified the fees as a matter of law. This is not so.

The jury was instructed, in accordance with the partnership agreement, that Oates could be compensated for services as an employee or independent contractor *only* by majority vote of the partners. Waiver of a contractual right is ordinarily a question of fact. (*Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal.App.3d 1, 25.) The jury was instructed on the elements of waiver, yet found against Oates. The jury's implied finding against a waiver must be upheld as long as it was supported by substantial evidence. This is the case here.

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[4] A $500 per month management fee was expressly authorized by the TIC agreement. Thus, the compensatory damages award did not include TIC management fees.

Waiver is the intentional relinquishment of a known right. (*Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 49.) Oates introduced no evidence that the partners were personally aware that he was appropriating a monthly management fee and either ratified or consented to it. That such a fee may have shown up as a line item on various monthly partnership financial statements falls well short of establishing a waiver as a matter of law.

B. The Markups

The evidence showed that, in managing the Cypress partnership, Oates used BOE II as a dummy middleman to mark up invoices for goods and services. As a result, instead of paying the face amount of the invoices, the partnership was charged a secret markup, which was funneled directly into an Oates-controlled company. (See p. 94, *ante*.)

Defendants claim they are not liable in damages for the markups because (1) the markups merely reimbursed BOE II for overhead costs, and (2) the partnership agreement allows the managing partner the right to reimburse himself for "general office and additional expenses." These arguments fail.

First, the predicate for defendants' argument that the markups constituted reimbursement for overhead costs is based solely on Oates's own testimony. As the judges of credibility, the jurors were entitled to reject even uncontradicted testimony in its entirety, as long as there was a rational basis for doing so. (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971.) Oates's failure to back up his assertion with hard evidence, along with his history of misappropriation and deception in other transactions, provided such a rational basis.

Second, Oates's assertions fail to account for the duties he undertook by virtue of his fiduciary relationship to the other partners. (*Cagnolatti v. Guinn* (1983) 140 Cal.App.3d 42, 48 (*Cagnolatti*); see Corp. Code, § 16404.) "Partnership is a fiduciary relationship, and partners are held to the standards and duties of a trustee in their dealings with each other. '" 'Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.' [Citations.]'" [Citation.] Moreover, this duty extends to all aspects of the relationship and all transactions between the partners. " 'Each [partner] occupie[s] the position of a trustee to the other with regard to all the partnership transactions, including the transactions contemplated by the firm and constituting the object or purpose for which the partnership was formed.'" [Citation.]" (*BT-I v. Equitable Life Assurance Society* (1999) 75 Cal.App.4th 1406, 1410-1411, citing *Leff v. Gunter* (1983) 33 Cal.3d 508, 514.) "A partner has no right to deal with partnership property other than for the sole benefit of the partnership [citation]." (*Cagnolatti, supra,* 140 Cal.App.3d at p. 48, citing *Prince v. Harting* (1960) 177 Cal.App.2d 720, 727, quoting *Llewelyn v. Levi* (1909) 157 Cal. 31, 37; accord *Galardi v. State Bar* (1987) 43 Cal.3d 683, 693.)

The Cypress partnership agreement is clear that the managing partner or his "affiliate" can receive reimbursement only for "verified and authorized expenses incurred by him in connection with the Partnership business" and then only when authorized by majority vote of the partners. Oates violated these covenants in diverting partnership funds to BOE II through A & A without the knowledge of the other partners. His self-serving, post hoc explanation that he was reimbursing himself for "overhead" was entitled to, and received, no weight by the jury.

Defendants speculate that *if* Oates had gone to the partners and had asked to be reimbursed for overhead, they "would have been *required* to approve it because the request was commercially reasonable"; any other answer, defendants assert, "would have been a breach of [the partners'] fiduciary duties." The suggestion is that defendants should be absolved from committing fraud and breach of fiduciary duty because of what *might* have occurred had Oates acted properly under a hypothetical set of circumstances. This is nonsense.

As managing partner, Oates was prohibited from engaging in self-dealing in any way, shape or form. (*Cagnolatti, supra,* 140 Cal.App.3d at p. 48.) "The law does not permit a fiduciary to deal with himself in any transaction in his individual capacity [citation]." (*Ibid.,* citing *Estate of Boggs* (1942) 19 Cal.2d 324, 333.) "Neither a trustee nor any of his agents may take part in any transactions concerning the trust except when a fully informed beneficiary who is free from the trustee's influence authorizes the transaction [citation]." (*Cagnolatti,* at p. 49, italics omitted.)

It is no answer that the proceeds from self-dealing might be deemed "fair compensation" to the faithless partner. " 'Courts will not permit an investigation into the fairness or unfairness of such a transaction or allow the trustee to show that the dealing was for the best interest of the beneficiaries. It is a trustee's duty in all things to first consider and always to act for the best interests of the trust. [Citation.]' [Citations.]" (*Cagnolatti, supra,* 140 Cal.App.3d at p. 49, quoting *Toedter v. Bradshaw* (1958) 164 Cal.App.2d 200, 208.)[5]

Defendants' speculations about what *might* have happened are both irrelevant and without evidentiary support. Oates engaged in fraudulent self-dealing and enriched himself and his companies in violation of the partnership agreement and his fiduciary duties. Defendants were obligated to replace those profits, with interest. (*Cagnolatti, supra,* 140 Cal.App.3d at pp. 49-50; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240-1241, 44 Cal.Rptr.2d 352; *Stout v. Turney* (1978) 22 Cal.3d 718, 725-726.)[6]

C. Incorrectly Billed Invoices

Plaintiffs presented evidence that the Cypress partnership was charged $734.50 for invoices that were not chargeable to the partnership. In response to a special interrogatory, the jury found in favor of plaintiffs "regarding . . . payments for invoices that were not the responsibility of the partnership."

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[5] The markups charged to the TIC after the demise of the Cypress partnership constituted gains equally as illicit as those skimmed from the partnership. As the jury was correctly instructed, Oates owed the same fiduciary duties to his cotenants as he did to his partners. (See *Wilson v. S.L. Rey, Inc.* (1993) 17 Cal.App.4th 234, 242; *Air Purification, Inc. v. Carle* (1950) 99 Cal.App.2d 258, 264.)

[6] Defendants' companion claim that the markups were permissible because BOE II would have been able to recover the value of its services on a quantum meruit theory of relief not only suffers from the same flaws as their overhead compensation theory, but may not be urged here because it was never raised in the trial court. New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 8:231, p. 8-113.)

Defendants contend this finding is infirm because plaintiffs did not present evidence that Oates "knew of, or caused," the items to be falsely billed to the partnership. However, Oates admitted the subject billings were incurred for services rendered on a building *he* co-owned, and were not legitimate partnership debts. Based on Oates's pattern of deception and self-dealing, the jury could reasonably infer that he knew these billings were improper, and intended to divert partnership funds to enrich himself. The jury's special verdict on this issue was supported by substantial evidence and may not be disturbed.

D. The Ewing Commission

Defendants next challenge the jury's findings on the secret diversion of the Ewing commission to BORE. While admitting that "[Kevin] Ramos'[s] nondisclosure of the commission division arrangement, and the surreptitious way in which this payment was handled, was inexcusable," defendants contend plaintiffs suffered no harm because the four percent realtor's commission paid by the partnership was a "commercially reasonable" rate.

Oates seeks to justify self-dealing and duplicity by urging that his secret profits might be deemed reasonable compensation had it been paid to a third party in an arm's length transaction. Again he overlooks the provisions in the partnership agreement clearly prohibiting the payment of reimbursement or compensation without a majority vote of the partners. But even without such a clause, Oates was not entitled to pay himself a secret commission from partnership assets: "The rule is '[a]bsent an express agreement, a partner is not entitled to any compensation for his services to the partnership other than his share of the profits' [citation]." (*Cagnolatti, supra,* 140 Cal.App.3d at p. 50, quoting *Wind v. Herbert* (1960) 186 Cal.App.2d 276, 286.)

Under established law, the secret profit Oates reaped for himself on the Ewing commission rightly belonged to the TIC. (See *Western States Life Ins. Co. v. Lockwood* (1913) 166 Cal. 185, 190-191; see also Civ. Code, § 2224 ["One who gains a thing by fraud, . . . the violation of a trust, or other wrongful act, is . . . an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it"].) There was no error in requiring defendants to refund the Ewing commission to plaintiffs.

E. The Cottonwood Commission

The Cottonwood commission presents a somewhat more complicated deception than the Ewing arrangement. Cottonwood entered into a contract to buy one parcel of TIC property and three adjacent parcels of land owned by Oates and Ramos as a package deal. Since CB procured Cottonwood as a buyer, CB was owed at least a portion of the listing commission on all four parcels.

The buyer's broker, Cushman & Wakefield, received its standard two percent commission, so splitting the remaining two percent commission equally between BORE and CB *as to all four parcels* was the obviously fair method of allocation.

However, Kevin entered into a secret deal with CB whereby CB took a *two percent* commission on the parcel owned by the TIC, while the Oates-controlled BORE company took its commission on the sale of the three parcels owned by Oates and Ramos. The net effect of this arrangement was to place an unequal burden of the seller's commission on the TIC partners, while allowing Oates to avoid paying any commission to CB on the sale of the property he co-owned with Ramos.

But, Oates replies, there was no evidence that paying a four percent total commission on a commercial land sale such as this was unreasonable. Therefore, he asks rhetorically, "Where's the beef?"

The "beef" is that Oates shifted the CB-earned commission, which should have been borne equally by the owners of all four parcels, exclusively onto the TIC owners. By practicing this deception, Oates also enriched himself, since the commission paid on the three Oates-Ramos parcels was funneled entirely to an Oates-controlled real estate brokerage.

The jury could reasonably have concluded that Oates owed a fiduciary duty not to make a secret profit at the expense of his cotenants on the TIC parcel. As the California Supreme Court declared: "'When one undertakes to deal with himself in different capacities – individual and representative – there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal; his self interest prompts him to make the best bargain for himself. Humanity is so constituted that when these conflicting interests arise the temptation is usually too great to be overcome; and duty is sacrificed to interest. In order that this temptation may be avoided, or, if indulged in, must be at the peril of the trustee, it has been wisely provided that the trustee shall not be permitted to make or enforce any contract arising between himself as trustee and individually with reference to any matter of the trust, nor will the court enter into any examination of the honesty of the transaction.'" (*Western States Life Ins. Co. v. Lockwood, supra,* 166 Cal. at p. 191.)

Defendants' assertion that a four percent real estate commission was commercially reasonable for the Cottonwood sale is beside the point. Just as an "agent [who] conceals his interest in property sold or buys property for his principal at a price less than he charges his principal, . . . must disgorge the secret profit even if the property is worth the larger amount and the principal was willing to pay it" (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 458), Oates may not avoid liability for the secret profit he made as a result of a fraudulent breach of fiduciary duty on the excuse that his cotenants might have paid a comparable sales commission to an outside broker.

F. Conclusion

We find no error in the award of compensatory damages and shall affirm the compensatory damages portion of the judgment.

II. Punitive Damages

Defendants claim the punitive damages awarded by the jury – $5 million against Oates personally and $2 million against his property management company, A & A, were plainly excessive and violated the state and federal Constitutions.

We note at the outset that defendants tender no separate argument challenging the *propriety* of punitive damages. Accordingly, we accept as true, for purposes of this appeal, the jury's finding that Oates and A & A "committed malice, oppression or fraud" in the conduct which forms the basis of the compensatory damages award.

A. *The Calculation of Ratio*

Before turning to the merits of the arguments against the punitive damages award, it is necessary to dispose of a hotly contested issue to which the parties devote much briefing, but which we believe can be resolved without much difficulty: the proper compensatory damages figure to be used in determining the ratio of punitive damages to actual damages as found by the jury.

The answer can be found in the special verdict form, which asked the jury: "If you found any defendant liable to plaintiffs, *what do you find to be the total amount of damages suffered by plaintiffs* as a result of the conduct upon which you base your finding of liability." (Italics added.) The jury's answer was $165,527.63. The basis for the damages figure is easily ascertainable from an examination of plaintiffs' exhibit 326. The exhibit contains an itemized list of nine categories of economic damages, together with interest accrued on each item of damage. Plaintiffs' damages expert testified that simple interest was calculated at the legal rate of seven percent from the date of the transaction to the time of trial. If we eliminate the item "Expenses Without Documentation" set forth on exhibit 326, the jury's special verdict figure matches exhibit 326 to the penny.[7]

Defendants would have us exclude the prejudgment interest component of the award. Plaintiffs would include such additional amounts as attorney fees and costs, damages caused to hypothetical plaintiff Frank Ramos, and even "damages . . . caused by defendants' pattern of misconduct to *other* partners in *other* partnerships." (Italics added.)

We reject both formulations. "Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. [Citations].' [Citation.]" (*Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1059 (*Marron*), italics omitted, quoting *Cooper Ind. v. Leatherman Tool Grp.* (2001) 532 U.S. 424, 432 [149 L.Ed.2d 674, 684] (*Cooper Industries*).) The idea behind looking at ratios is that "[p]unitive damages must bear a reasonable relationship and be proportionate to the actual harm suffered by the plaintiff (i.e., compensatory damages)." (*Marron, supra,* at pp. 1059-1060; see also *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 580 (*Gore*) [134 L.Ed.2d 809, 829].) Logic and common sense tell us that the amount the jury found to be the "*total amount of damages suffered by plaintiffs*" (italics added) – $165,527.63 – most closely reflects the United States Supreme Court's formulation of the "actual harm as determined by the jury" (*Gore, supra,* 517 U.S. at p. 582 [134 L.Ed.2d at p. 830]), and should be used as the base figure in calculating the ratio for punitive damages.

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[7] The total damages figure on exhibit 326, including interest, is $254,312.41. The item "Expenses Without Documentation" including accrued interest, is $88,784.78. The difference between the two figures, $165,527.63, is the precise amount the jury awarded.

B. Due Process Under Campbell

A party challenging a punitive damages award is entitled to de novo review by the appellate court to ensure the award is not excessive under the due process clause of the federal Constitution. (*Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, 1149-1150 139 (*Romo I*), citing *Cooper Industries, supra,* 532 U.S. at pp. 431-433 [149 L.Ed.2d 674, 683-684].)

Until relatively recently, the United States Supreme Court maintained a "hands off" policy in examining state punitive damages awards under the constitutional microscope.

As recently as 1989, the high court held that "neither the Excessive Fines Clause of the Eighth Amendment nor federal common law circumscribed awards of punitive damages in civil cases between private parties." (*Campbell, supra,* 538 U.S. at p. 430 [155 L.Ed.2d at p. 609] (dis. opn. of Ginsburg, J.), citing *Browning-Ferris v. Kelco Disposal* (1989) 492 U.S. 257, 262-276, 277-280 [106 L.Ed.2d 219, 230-239, 239-241].) Two years later, in *Pacific Mutual Life Insurance Company v. Haslip* (1991) 499 U.S. 1 [113 L.Ed.2d 1], the Supreme Court warned that "unlimited jury [or judicial] discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." (*Id.* at p. 18 [113 L.Ed.2d at p. 20].) Nevertheless, the court upheld a punitive damages award "more than 4 times the amount of compensatory damages, . . . more than 200 times [the plaintiff's] out-of-pocket expenses," and "much in excess of the fine that could be imposed." (*Id.* at p. 23 [113 L.Ed.2d at p. 23].) This was followed by *TXO Production v. Alliance Resources* (1993) 509 U.S. 443 [125 L.Ed.2d 366] (*TXO*), wherein the Supreme Court affirmed a state court "$10 million punitive damages award – an award 526 times greater than the actual damages awarded by the jury." (*Id.* at 453 [125 L.Ed.2d at p. 376] (lead opn. of Stevens, J.).) Still, the court obviously struggled with the size of the award in what Justice Kennedy described as a "close and difficult" case. (*Id.* at p. 468 [125 L.Ed.2d at p. 386] (conc. opn. of Kennedy, J.).) The factors that tipped the scales in favor of the plaintiff were that the defendant's conduct was part of a "larger pattern of fraud, trickery and deceit" and that while the actual damages were low, they would have been many times greater had the defendant gotten away with its "malicious and fraudulent" scheme. (*Id.* at p. 462 [125 L.Ed.2d at p. 382] (lead opn. of Stevens, J.).)

In *Gore, supra,* 517 U.S. 559 [134 L.Ed.2d 809], the Supreme Court finally found a punitive damages award that it felt crossed the constitutional line. There, the justices reviewed a $2 million punitive damages award rendered on a verdict of only $4,000 in compensatory damages. The shock value of defendant's conduct in *Gore,* however, was minimal – a car manufacturer had concealed the fact that it repainted new vehicles whenever they sustained minor damage prior to shipment to the dealer. (*Id.* at pp. 563-565 [134 L.Ed.2d at pp. 819-820].) Worse still, the conduct was legal in a number of other states, prompting the high court to admonish that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." (*Id.* at p. 572 [134 L.Ed.2d at p. 824].)

In *Gore,* the Supreme Court fashioned three "guideposts" for appellate courts to employ when assessing whether a punitive damages award comports with federal due process requirements: (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (*Gore, supra,* 517 U.S. at pp. 574-575 [134 L.Ed.2d at p. 826].)

Applying its newly minted test, the *Gore* majority found that the punitive damages award, more than 500 times the "actual harm as determined by the jury," transcended constitutional limits, especially in the absence of any suggestion the plaintiff or other car purchasers were threatened with additional potential harm as a result of BMW's conduct. (*Gore, supra,* 517 U.S. at pp. 582, 585-586 [134 L.Ed.2d at pp. 830, 833].)

If, in *Gore,* the high court threw a lasso around the problem of what it had previously identified as "punitive damages awards "'run wild'"" (*TXO, supra,* 509 U.S. at p. 475 [125 L.Ed.2d at p. 390]), in *Campbell* it tightened the noose considerably.

In *Campbell,* the justices threw out a $145 million punitive damages award based on $1 million in compensatory damages. The case involved State Farm Mutual Automobile Insurance Company, which the jury found engaged in bad faith, fraud and intentional infliction of emotional distress in refusing to settle a third party claim for the policy limits, ignoring the advice of their own investigators. (*Campbell, supra,* 538 U.S. at pp. 413-414

[155 L.Ed.2d at p. 598].) Plaintiffs introduced evidence that the conduct was part of a nationwide pattern of bad faith practices, including denying liability and capping payouts, in an effort to boost corporate profits. (*Id.* at p. 415 [155 L.Ed.2d at p. 599].)

The United States Supreme Court reversed. The court again applied the *Gore* guideposts, but this time delineated several "substantive constitutional limitations" on punitive damages awards (*Campbell, supra,* 538 U.S. at p. 416 [155 L.Ed.2d at p. 600]). These limits may be summarized as follows: The reprehensibility of the defendant's conduct is the *most important* of the three factors. (*Id.* at p. 419 [155 L.Ed.2d at p. 602].) To this end, the court broke down the reprehensibility factor into five subfactors, which we shall discuss later in this opinion.

With respect to the relationship between the compensatory damages and the punitive damages award, the court again declined to impose any bright-line ratios. However, it cautioned that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." (*Campbell, supra,* 538 U.S. at p. 425 [155 L.Ed.2d at pp. 605-606].) Conversely, lower ratios – perhaps as low as one to one – may "reach the outermost limit of the due process guarantee" where "compensatory damages are substantial." (*Ibid.* 538 U.S. 408 [155 L.Ed.2d at p. 606].) In any event, the "precise award . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*Ibid.*) Finally, the wealth of the defendant, while relevant, "cannot justify an otherwise unconstitutional punitive damages award," nor can it make up for the lack of other factors such as reprehensibility. (*Id.* at pp. 427-428 [155 L.Ed.2d at p. 607].)

The *Campbell* court ruled that the punitive damages award, which bore a ratio of 145 to 1 to the compensatory damages, violated due process. Two factors heavily underscored this assessment: (1) the plaintiffs' attorneys impermissibly used the case "as a platform to expose, *and punish,* the perceived deficiencies of State Farm's operations throughout the country" (*Campbell, supra,* 538 U.S. at p. 420 [155 L.Ed.2d at p. 602], italics added), and (2) the plaintiffs were awarded substantial compensatory damages, including those for emotional distress resulting from outrage and humiliation, which tended to duplicate elements of the punitive damages award. (*Id.* at p. 426 [155 L.Ed.2d at pp. 606-607].) The court also noted that the maximum state civil penalty for the wrong done to the Campbells was $10,000, an amount "dwarfed" by the large punitive damages verdict. (*Id.* at p. 428 [155 L.Ed.2d at p. 608].)

The shock waves from *Campbell* have already reverberated in the appellate courts of California. In *Romo I, supra,* 99 Cal.App.4th 1115 and *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 (*Romo II*), Ford Motor Company willfully and consciously ignored the dangers to human life inherent in its Bronco design, resulting in the deaths of three persons. Ford "ignored its own internal safety standards, created a false appearance of the presence of an integral roll-bar, and declined to test the strength of the roof before placing it in production." (*Romo II, supra,* at p. 755, citing *Romo I, supra,* at p. 1148.) On remand after *Campbell,* the Court of Appeal, Fifth Appellate District, in *Romo II* struck down a $290 million punitive damages verdict issued on a compensatory damages award of $4.5 million. (*Romo II,* at p. 763.) Even though it found Ford's conduct "highly reprehensible" (*id.*

at p. 755), the court could not constitutionally justify such a sum. The appellate court ordered a remittitur reducing the punitive damages award to $23.7 million or five times the total compensatory damages figure. (*Id.* at p. 763.)

And in *Diamond Woodworks, Inc. v. Argonaut Ins. Co.* (2003) 109 Cal.App.4th 1020, 1056-1057 (*Diamond Woodworks*), a punitive damages award against an insurance company found guilty of bad faith, fraud and breach of contract bearing a 21-to-1 ratio to the actual damages as found by the appellate court was reduced to $1 million, or approximately 3.8 times the fraud compensatory figure.

C. Application of Campbell to This Case

We now proceed to analyze the present punitive damages award of $7 million[8] to see whether it comports with due process in light of the factors laid out in *Campbell.*

1. Reprehensibility

The degree of reprehensibility has been called "'[t]he most important indicium of the reasonableness of a punitive damages award. . . .'" (*Campbell, supra,* 538 U.S. at

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[8] We combine the punitive damages awards of $5 million against Oates and $2 million against A & A together for two reasons. First, defendants do not dispute that Oates was the manager and principal owner of A & A, and there is no compelling reason, on this record, to maintain strict culpability lines between the two defendants. Second, the jury found defendants jointly liable for a single compensatory damages figure. Any reasoned proportionality analysis must therefore compare the *total* amount of economic harm to plaintiffs with the *total* punitive damages verdict. We are mindful of the jury's allocation of punitive damages however, and it will be reflected in our disposition.

p. 419 [155 L.Ed.2d at p. 602].) In weighing reprehensibility, *Campbell* lists five subfactors, i.e., whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of "intentional malice, trickery, or deceit, or mere accident." (*Ibid.*)

The first three of these factors do not favor an extremely high punitive damages award: All of the harm caused by defendants here was economic. None of it involved reckless endangerment to health or safety. Nor is it accurate to characterize plaintiffs, who were fellow investors with Oates in a multimillion-dollar land speculation deal, as financially vulnerable.

On the other hand, the fourth and fifth factors favor a high-end punitive damages award. The jury could find that the kickbacks, markups and concealed commissions were part of a systematic pattern by Oates of bilking his partners out of funds legitimately belonging to the partnership. He repeatedly fleeced the partnership to line his own pockets. Oates was unrepentant at trial, insisting that "in [his] heart" be believed he did nothing wrong. The record also overwhelmingly supports a finding that the harm was caused as the result of intentional fraud, malice and deceit. Indeed, BOE II, a division of A & A, seems to have been set up as a middleman operating primarily for the purpose of skimming off profits for Oates's enrichment.[9]

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[9] There was evidence in the record that Oates's net worth was between $600 and $800 million. A Forbes magazine article ranked

(Continued on following page)

We conclude that the conduct the jury sought to punish here was of high, but not extreme reprehensibility.

2. Ratio

The second factor to consider is the relationship between the punitive damages award and the actual harm suffered, as reflected in the jury's award of compensatory damages. Here, the combined punitive damages award was $7 million and the compensatory damages award was $165,527.63, a ratio of more than 42 to 1. In light of the United States Supreme Court's declaration that "few awards" exceeding a single-digit ratio "will satisfy due process" (*Campbell, supra,* 538 U.S. at p. 425 [155 L.Ed.2d at pp. 605-606]), this ratio cannot stand unless extraordinary factors are present.

Campbell notes three possible exceptions to the single-digit ratio rule: where "'a particularly egregious act has resulted in only a small amount of economic damages,'" where "'the injury is hard to detect,'" or where "'the monetary value of noneconomic harm might have been difficult to determine.'" (*Campbell, supra,* 538 U.S. at p. 425 [155 L.Ed.2d at p. 606], quoting *Gore, supra,* 517 U.S. at p. 582 [134 L.Ed.2d at p. 831].)

We find no basis for concluding that the injury was especially hard to detect. Only measurable economic damages resulted. Nor can we say with confidence, as in *TXO,* that this is a case where plaintiffs would have

---

Oates 288th on a list of the nation's 400 wealthiest individuals, estimating his worth at some $800 million. Oates testified that he was misquoted – he assertedly told Forbes he was worth only $600 to $650 million.

sustained far more damages had Oates's deceptive conduct not been unveiled.

Plaintiffs argue that the damage caused to them was only the tip of the iceberg because Oates was responsible for unauthorized markups which defrauded hundreds of other partnerships. The claim is unpersuasive, both on the facts and the law.

To support their assertion, plaintiffs refer us to a stack of invoice exhibits that they claim, without citation to the reporter's transcript, demonstrate improper markups for 119 other Oates partnerships. Taking the average markup percentage from the record in this case, they surmise that Oates must have generated for himself markups of over $4.5 million on other transactions.

However, the jury was not made privy to the contractual arrangements Oates had with other partnership entities, nor did the instructions allow them to consider damages suffered by others. Furthermore, to include speculative damages suffered by other potential plaintiffs in the calculus would run directly contrary to the Supreme Court's admonition in *Campbell* that "[a] defendant should be punished for the *conduct that harmed the plaintiff,* not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims. . . ." (*Campbell, supra,* 538 U.S. at p. 423 [155 L.Ed.2d at p. 604], italics added.) We therefore refuse to add into the equation any monetary losses that Oates might have wrought on third parties not involved in this lawsuit.

Nevertheless, we believe it is fair to say the amount of damages suffered by plaintiffs was relatively small in comparison to the seriousness of the defendants' conduct. The jury verdict leaves no doubt that Oates committed egregious misconduct. The judgment is not based on occasional transgressions, nor was it the product of negligence or sloppy accounting. Fraud and breach of fiduciary duty are universally deplored throughout our society; the jury's award reflects its repugnance at the intentional, oppressive and malicious conduct practiced here. Thus, in our view the compensatory damages figure does not fully reflect the blameworthiness of the acts condemned by the jury. In this respect, our case is a stronger candidate for a high punitive damages verdict than *Romo II*, for example, where the appellate court struck down a double-digit ratio primarily because the plaintiffs had been made whole by large compensatory damages awards, including those for emotional distress.

3. *Civil and criminal penalties for like conduct*

The final *Campbell* factor is the difference between the punitive damages awarded by the jury and other civil penalties authorized or imposed in comparable cases. (*Campbell, supra,* 538 U.S. at p. 428 [155 L.Ed.2d at pp. 607-608].) While the "violation of common law tort duties . . . do not [easily] lend themselves to a comparison with statutory penalties" (*Continental Trend Resources, Inc. v. OXY USA Inc.* (10th Cir. 1996) 101 F.3d 634, 641), we do note that California typically imposes treble damages penalties for fraudulent and bad faith conduct. (See Civ.Code, §§ 1947.10 [fraudulent intent to occupy rental premises], 1738.15 [willful failure to pay commissions], 1057.3, subd. (b) [bad faith refusal to release escrow deposit], 1719, subds. (a)(2), (3) [writing a dishonored check without good faith dispute as to the debt].) Likewise, in instances involving harm to real property, actual damages may be trebled for injury to trees, waste to real property and forcible or unlawful entry to a building or real property. (See Code Civ. Proc., §§ 732, 733, 735.) Where intentional acts of fraud are involved, ratios of at least 3 to 1 appear to be called for.

Our discussion on this point would not be complete without the observation that California also imposes substantial *criminal* penalties for embezzlement and breach of fiduciary duty. (See Pen. Code, §§ 484 [theft], 503 [embezzlement], 506 [entrusted with property of another; fraudulent intent to appropriate], 514 [punishment].) Embezzlement of more than $400 constitutes grand theft, which may carry a state prison sentence. (*Id.*, §§ 514, 487.) "Any person who commits two or more related felonies, a material element of which is fraud or embezzlement, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of more than one hundred thousand dollars ($100,000)" (Pen. Code, § 186.11, subd. (a)(1)), shall receive a consecutive two-year enhancement on any prison sentence imposed when the loss exceeds $150,000 (*id.*, § 12022.6, subd. (2)). The jury here found that defendants reaped over $100,000 in illicit profits through multiple acts of fraud and self-dealing.

Although we are aware that defendants' conduct has not been adjudicated in a criminal proceeding, we take note of these penalties as reflective of "the seriousness with which [our] State views the wrongful action." (*Campbell, supra,* 538 U.S. at p. 428 [155 L.Ed.2d at p. 608].)

D. Excessiveness Under State Law

Defendants also claim the punitive damages award is excessive under California law. Since the punitive damages award must be reduced based on the due process clause of the federal Constitution as interpreted by *Campbell,* we determine only whether California's Constitution would require a further reduction of the punitive damages beyond that required by the federal Constitution. We conclude it does not.[10]

Under California law, a punitive damages award may be reversed as excessive "only if the entire record, viewed most favorably to the judgment, indicates the award was the result of passion and prejudice." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1658) "The purpose of punitive damages is a public one – to punish wrongdoing and deter future misconduct by either the defendant or other potential wrongdoers. The essential question for the jury, the trial court, and the appellate courts is whether the amount of the award substantially serves the public interest in punishment and deterrence. The California Supreme Court has established three criteria for making that determination: (1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages, though there is no fixed ratio for determining whether punitive damages are reasonable in relation to actual damages; and (3) the defendant's financial condition. [Citations.] The wealthier the wrongdoer, the larger the punitive damage[s] award must be to meet the goals of punishment and deterrence. [Citations.]" (*Ibid.*) An award that can simply be written off as part of the cost of doing business does not attain this objective. (See *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 820.) As the state Supreme Court declared, "'the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.'" (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110.)

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[10] The California Supreme Court has granted review in three appellate decisions addressing the issue of punitive damages awards. (*Henley v. Philip Morris, Inc.* (2004) 114 Cal.App.4th 1429, 9 Cal.Rptr.3d 29, review granted Apr. 28, 2004, S123023; *Simon v. San Paolo U.S. Holding Company* (2003) 113 Cal.App.4th 1137, 7 Cal.Rptr.3d 367, review granted Mar. 24, 2004, S121933; *Johnson v. Ford Motor Company,* review granted Mar. 24, 2004, S121723.)

Under this standard, no further reduction of the punitive damages award, as modified here in light of *Campbell,* is required.

E. Conclusion

Based on the foregoing factors, we conclude that the punitive damages award here cannot exceed the single-digit ratio guidepost set forth in *Campbell* and still survive federal due process scrutiny. As we understand the United States Supreme Court's teachings in *Gore* and *Campbell,* a plaintiff would have to "run the table" on all three evaluative factors in order to sustain a punitive damages award that significantly exceeds a single-digit ratio to the amount of compensatory damages. This case does not meet that standard. Nevertheless, we believe that an award at the high end of the single-digit ratio spectrum is justified. We explain.

"*Campbell, Gore* and *Haslip* all suggest that in the usual case, i.e., a case in which the compensatory damages are neither exceptionally high nor low, and in which the defendant's conduct is neither exceptionally extreme nor trivial, the outer constitutional limit on the amount of punitive damages is approximately four times the amount of compensatory damages." (*Diamond Woodworks, supra,* 109 Cal.App.4th at p. 1057.)

In this case, a ratio of greater than four to one is warranted. As we have explained, defendants' fraudulent and deceptive conduct registers high on the reprehensibility meter. Second, as *TXO* vividly illustrates, the fact that only economic injury resulted does not mean that a punitive damages award should not sting. The United States Supreme Court still recognizes that "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct [citation] . . . can warrant a substantial penalty." (*Gore, supra,* 517 U.S. at p. 576 [134 L.Ed.2d at p. 827].) Since this is a case in which the amount of compensatory damages does not fully reflect the outrageousness of the behavior, under *Campbell* it merits a ratio higher than four to one.

The United States Supreme Court has consistently recognized that punitive damages serve the twin goals of punishment and deterrence. (See *Campbell, supra,* 538 U.S. at p. 416 [155 L.Ed.2d at p. 600] ["[P]unitive damages serve a broader function; they are aimed at deterrence and retribution"]; *Gore, supra,* 517 U.S. at p. 568 [134 L.Ed.2d at p. 822] ["Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"].)

In order to serve these aims, a punitive damages award must send a message to the offender and others in similar positions that this sort of behavior will not be tolerated. Here, a four-to-one ratio would yield a punitive damages award of only $660,000, less than one percent of

Oates's net worth according to the evidence most favorable to the judgment. (See fn. 9, *ante.*) When compared to the magnitude of the misconduct, such a figure would be tantamount to a slap on the wrist. We are mindful of *Campbell's* admonition that the wealth of a defendant will not *by itself* compensate for a lack of other factors. However, we believe the special circumstances described here warrant a higher single-digit ratio.

Considering and balancing all of the various due process factors, we conclude that a total punitive damages award of $1.5 million reaches the outermost limit in this case. This yields a ratio slightly exceeding nine to one – still within the single-digit threshold set out in *Campbell,* yet high enough to serve the goals of punishment and deterrence. We will therefore vacate the punitive damages verdict. Apportioning the $1.5 million between the two defendants to reflect the same culpability as found by the jury yields a reduced punitive damages award of $1,071,450 against Oates and $428,550 against A & A. We shall modify the verdict and affirm the judgment accordingly.

DISPOSITION

The compensatory damages award is affirmed. The punitive damages award is vacated and the judgment is modified by reducing the punitive damages award to $1,071,450 against Oates and $428,550 against A & A Properties. (Code Civ. Proc., § 43.) As modified, the judgment is affirmed. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a).)

BUTZ, J.

We concur:

SCOTLAND, P. J.,

BLEASE, J.

Bardis, et al. v. Oates, et al. (Sacramento Case No. 01AS03250)
Third District Court of Appeal Case No. 043040

PROOF OF SERVICE

I am over the age of eightten years and not a party to this action. My business address is: 650 University Avenue, Suite 205, Sacramento, CA 95825.

On the date specified below, I caused the following documents to be served:

PETITION FOR REVIEW

[XX] [BY MAIL] I am employed in the County were the mailing described below occurred, and am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. (I placed a true copy thereof [to which was attached a copy of this document(s)] in a sealed envelope(s) with postage thereon fully prepaid. The envelope(s) will be deposited with the United States Postal Service on this day in the ordinary course of business in Sacramento, California, following ordinary business practices.

[ ] [BY PERSONAL SERIVCE] I caused such envelope(s) to be delivered by hand to the addressee(s) listed below.

The envelope(s) was addressed to the following:

M. Max Steinheimer
Rhonda Cate Canby
555 Capitol Mall, Tenth Floor
Sacramento, CA 95814-4686

California Court of Appeal
Third Appellate District
900 N Street, Room 400
Sacramento, CA 95814
(Hand delivered by courier)

Hon. Lloyd A. Phillips
Sacramento County
Superior Court

720 Ninth Street, Room 611
Sacramento, CA 95814

California Supreme Court
Library & Courts Building,
Room 100
Sacramento, CA 95814
(Original + 13 copies)
(Hand delivered by courier)

I, Joan Thompson, declare under penalty of perjury that the foregoing is true and correct. Executed on July 6, 2004 at Sacramento, California.

/s/ Joan Thompson
Joan Thompson

Edward Freidberg, SBN 031279
Suzanna Pullen, SBN 188194
FREIDBERG LAW CORPORATION
650 University Ave., Suite 205
Sacramento, California 95825
(916) 929-9060

Attorneys for Plaintiffs
CHRISTO BARDIS; and LLOYD and
NANCY ARNOLD, a limited partnership

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

CHRISTO BARDIS, et al.,	**CASE NO. 01AS03250**
Plaintiffs,	**NOTICE OF ENTRY OF AMENDED JUDGMENT ON VERDICT**
vs.	
MARVIN L. OATES, et al.,	(Filed 11-4-02)
Defendants. /	

TO DEFENDANTS AND THEIR ATTORNEYS:

Notice is hereby given that on February 3, 2003, the Amended Judgment on Verdict was entered. A true and correct copy of said Amended Judgment on Verdict is attached hereto.

February 10, 2003

FREIDBERG LAW CORPORATION

By /s/ Edward Freidberg
EDWARD FREIDBERG

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

CHRISTO BARDIS, an individual, and; LLOYD and NANCY ARNOLD, a California limited partnership, Plaintiffs, vs. MARVIN L. OATES, an individual, general Partner and co-tenant, A & A PROPERTIES, A California corporation; et al., Defendants. /	CASE NO. 01AS03250 ***AMENDED JUDGMENT ON VERDICT***

THIS CAUSE came regularly for trial with EDWARD FREIDBERG appearing as counsel for the plaintiffs, CHRISTO BARDIS and LLOYD and NANCY ARNOLD, LP and EDWARD BRENNER, ROBERT JOHNSON and JANETH SAN PEDRO appearing as counsel for the defendants MARVIN L. OATES and A & A PROPERTIES, INC.

THEREUPON, a jury of twelve persons was duly accepted, empanelled and sworn to try said cause. Witnesses on the part of the plaintiffs and defendants were duly sworn and examined.

WHEREUPON, after hearing the evidence, the arguments of Counsel and instructions of the Court, the cause was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court and then rendered the following verdict, which was accepted by the Court and entered on the minutes, as follows:

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that CHRISTO BARDIS and LLOYD and NANCY ARNOLD, LP, plaintiffs, do have and recover from MARVIN L. OATES and A & A PROPERTIES, INC. the sum of ONE HUNDRED SIXTY-FIVE THOUSAND, FIVE HUNDRED TWENTY-SEVEN DOLLARS and SIXTY THREE CENTS ($165,527.63), with interest thereon at the legal rate from November 9, 2002 until paid.

IT IS FURTHER ORDERED that CHRISTO BARDIS and LLOYD ARNOLD and NANCY ARNOLD, LP, plaintiffs do have and recover from defendant MARVIN L. OATES, punitive damages in the sum of FIVE MILLION DOLLARS (5,000,000.00), together with interest thereon at the legal rate from November 9, 2002 until paid.

IT IS FURTHER ORDERED that CHRISTO BARDIS and LLOYD ARNOLD and NANCY ARNOLD, LP, plaintiffs, do have and recover from defendant A & A PROPERTIES, INC., punitive damages in the sum of TWO MILLION DOLLARS (2,000,000.00), together with interest thereon at the legal rate from November 9, 2002 until paid.

IT IS FURTHER ORDERED that CHRISTO BARDIS and LLOYD ARNOLD and NANCY ARNOLD, LP, plaintiffs, do have and recover said plaintiffs' costs and disbursements incurred in this action pursuant to the unchallenged memorandum of costs against defendants MARVIN L. OATES and A & A PROPERTIES, INC. in the sum of $36,242.26, together with interest thereon at the legal rate from November 9, 2002 until paid.

IT IS FURTHER ORDERED that CHRISTO BARDIS and LLOYD ARNOLD and NANCY ARNOLD, LP, do have and recover attorneys' fees against defendant MARVIN L. OATES in the sum of $348,667.50 pursuant to the court's ruling dated December 30, 2002, together with interest thereon at the legal rate from November 9, 2002 until paid.

IT IS FURTHER ORDERED that CHRISTO BARDIS and LLOYD ARNOLD and NANCY ARNOLD, LP, do have and recover attorneys' fees against defendant MARVIN L. OATES in the additional sum of $59,280.00 pursuant to the uncontested Supplemental Declaration of Edward Freidberg in Support of Motion for Attorneys' Fees dated January 6, 2003, together with interest thereon at the legal rate from November 9, 2002 until paid.

IT IS FURTHER ORDERED that CHRISTO BARDIS and LLOYD ARNOLD and NANCY ARNOLD, LP, do have and recover expert witness fees against defendants MARVIN L. OATES and A & A PROPERTIES, INC. in the sum of $3,000.00, together with interest thereon at the legal rate from November 9, 2002 until paid.

IT IS FURTHER ORDERED that cross-complainant, MARVIN L. OATES, take nothing by reason of his cross-complaint filed against cross-defendant CHRISTO BARDIS.

DATED: 02-03-03

LLOYD A. PHILLIPS
Honorable
LLOYD A. PHILLIPS, JR.
Judge of the Superior Court
of California, County of
Sacramento

Bardis, et al. v. Oates, et al., Sacramento County Superior Court Case No. 01AS03250.

PROOF OF SERVICE

I am over the age of eighteen years and not a party to this action. My business address is: 650 University Avenue, Suite 205, Sacramento, California 95825.

On the date specified below, I caused the following document(s) to be served:

NOTICE OF ENTRY OF AMENDED JUDGMENT ON VERDICT

(X) (**BY MAIL**) I am employed in the County where the mailing described below occurred, and am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Services. I placed a true copy thereof [to which was attached a copy of this document(s)] in a sealed envelope(s) with postage thereon fully prepaid. The envelope(s) will be deposited with the United States Postal Service on this day in the ordinary course of business in Sacramento, California, following ordinary business practices.

( ) (**BY PERSONAL SERVICE**) I caused such envelope(s) to be delivered by hand to the addressee(s) listed below.

(☐) (**BY FACSIMILE AND MAIL**) I caused the document(s) listed above to be served by telefaxing said document(s) to the number(s) listed below at the location(s) shown as follows and thereon fully prepaid and deposited the envelope(s) with the United States Postal Service (as described in the service by mail above).

(☐) (**BY FEDERAL EXPRESS**) I caused the document(s) to be served by placing a true copy thereof [to which was attached a copy of this document(s)] in a sealed Federal Express overnight envelope bearing Airbill No. ___. The overnight envelope was then picked up by a Federal Express employee at the above business address in Sacramento, California, and was addressed as listed below.

The envelope(s) was addressed to the following:

M. Max Steinheimer
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Steven L. Mayer
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NEMEROVSKI, CANNADY,
FALK & RABKIN
Three Embarcadero Center,
Seventh Floor
San Francisco, California 94111

I, Joan Thompson, declare under penalty of perjury that the foregoing is true and correct. Executed on February 10, 2003 at Sacramento, California.

/s/ Joan Thompson
Joan Thompson

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

CHRISTO BARDIS et al.,
Plaintiffs and Respondents,

v.

MARVIN L. OATES et al.,
Defendants and Appellants.

(Filed Jun. 15, 2004)

C043040
Sacramento County
No. 01AS03250

BY THE COURT:

Respondents' petition for rehearing is denied.

Dated: June 15, 2004

SCOTLAND, P.J.

cc: See Mailing List

Court of Appeal, Third Appellate District – No. C043040
S126089

IN THE SUPREME COURT OF CALIFORNIA

En Banc

CHRISTO BARDIS et al., Plaintiffs and Respondents,

v.

MARVIN OATES et al., Defendants and Appellants.

Petitions for review DENIED.

(Filed Sep. 15, 2004)

/s/ George
Chief Justice

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

CHRISTO BARDIS, et al. *Plaintiffs, Cross-Defendants and Respondents,* v. MARVIN L. OATES, et al., *Defendants, Cross-Complainants and Appellants.* /	**CASE NO. C043040** **(Sacramento County Superior Court Case No. 01AS03250)**

Appeal From A Judgment Of The Superior Court
For The County of Sacramento
(Hon. Lloyd A. Phillips, Presiding)

RESPONDENTS' PETITION FOR REHEARING

(Filed Jun. 11, 2004)

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I. INTRODUCTION

Petitioners CHRISTO BARDIS and LLOYD and NANCY ARNOLD, a California limited partnership (Respondents) respectfully request a rehearing to address (1) omissions of material facts from the Court's May 28, [2004] Opinion ("Opinion") and (2) to correct mistakes of law that have caused an erroneous decision. Without a rehearing and reconsideration of the issues presented, there is substantial error in the decision. (Cal.Cts. of App. Int. Op. Prac. & Pro. 1st App. Dist § 24.)

II. LEGAL BASIS FOR REHEARING AND MODIFICATION

A rehearing can be granted on petition of a party or the Court's own Motion. (CRC 25(a)(1)) A rehearing may be granted on the ground that the court's opinion misstated or omitted a material fact in the case, or misstated or failed to address a material issue. (9 Witkin, *California*

Proc. (4th ed.), Appeal, §849, p. 885, *In Re Jessup's Estate* (1889) 81 Cal.408, 471.) A rehearing can also be granted on the ground that the Court reached an erroneous decision because of a mistake of law. (*Ibid.*)

III. THE REHEARING SHOULD BE GRANTED AND THE OPINION MODIFIED BECAUSE THERE ARE OMISSIONS OF MATERIAL FACTS AND THE COURT REACHED AN ERRONEOUS DECISION BECAUSE OF A MISTAKE OF LAW WITH REGARD TO ITS FAILURE TO INCLUDE THE JUDGMENT FOR ATTORNEY FEES AND COSTS AWARDED RESPONDENTS AS PART OF THE "INJURY, HARM OR DAMAGE ACTUALLY SUFFERED BY THE PLAINTIFF" FOR PURPOSES OF DETERMINING THE CONSTITUTIONALLY PERMISSIBLE LIMIT OF THE PUNITIVE DAMAGE AWARD.

A. The Court Has Omitted From Its Opinion That The Respondents Were Awarded Attorneys Fees of $407,947.50 And Recoverable Costs And Expert Witness Fees of $39,242.26 As Part Of The Judgment Against Appellants.

Respondents argued in their Respondents' Brief ("Brief") that the attorneys' fees and costs that the Court awarded them are "injury, harm or damage" which must be considered in applying the ratio of damages to punitive damages. (Brief, pp. 46-49) The Opinion rejects this argument without setting forth that Respondents were awarded as damages attorneys' fees of $407,947.50 and recoverable costs and expert witness fees of $39,242.26 in the same judgment that awarded them $165,527.63, against Appellants. (AA 57, pp. 852, 853; Brief, pp. 48, 49; Opinion, p. 22) This omission is crucial to Respondents' position. It is respectfully submitted that the Opinion be modified to include these facts.

B. The Court's Failure To Consider That Portion Of The Judgment That Awarded Attorneys' Fees And Recoverable Costs As "Injury, Damage And Harm", To Be Considered In Determining The Constitutionally Permissible Limit Of The Punitive Damage Award Is Based Upon A Mistake Of Law.

This issue poses an issue of first impression in California and in the United States Supreme Court. It is Respondents' belief that the only cases which have discussed this issue are those cases set forth in the brief at page 48 which are the Georgia Court of Appeals in *Oglethorp Power Corp. v. Sheriff* (GA. Ct. App. 1993) 436 S.E.2d 14 and the Tenth Circuit Court of Appeals in *Continental Trend Resources, Inc. v. OXY USA, Inc.* (10th Circ. 1996) 101 F.3d 634) and *O'Gilvie v. International Playtex, Inc.* (10th Circ. 1987) 821 F.2d 1438 and the Kansas Supreme Court in *Binyon v. Nesseth* (1982) 646 P.2d 1043. All of the cases cited by Respondents have determined that the attorneys' fees and costs must be considered as part of the damages in determining the constitutionally permissible limit of the punitive damages award. (Brief, pp. 47-48.)

The Court's conclusion that the amount the jury found the damages suffered "most closely reflects the United States Supreme Court's formulation of the 'actual harm as determined by the jury' (*Gore, supra,* 517 U.S. at p. 582)"; (Opinion pp. 22-23) is not supported by the *Gore* decision.

Gore never stated the "harm, injury or damage" was to be limited to the jury's compensatory damage award.

The Court's citation to *Gore* is to a statement in *Gore* of a fact, not a legal opinion or conclusion. The *Gore* decision stated: "The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his **actual harm as determined by the jury**." (*Gore, supra,* 517 U.S. at p. 582.) That was a statement of fact. The *Gore* decision goes on to state: "Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and **potential** damages to the punitive award." *TXO,* 509 U.S. at 458." *Gore, supra,* 517 U.S. at 582 and *Campbell, supra,* 538 U.S. at 424, 425 cite this same language.

If the damages to be considered are limited to the award of compensatory damages, how can the *Gore* court state that potential damages may be considered? Potential damages certainly have not been determined by a jury since they are only potential damages that may occur in the future. The Supreme Court in *TXO, Gore* and *Campbell* endorse considering the harm that is likely to occur as well as the harm that has actually occurred. (*TXO, supra,* 509 U.S. at 460; *Gore, supra,* 517 U.S. at 582; *Campbell, supra,* 538 U.S. at 424, 425.)

Consideration of potential harm is acknowledged by this court in discussing *Gore* in which this Court cites as item number 2 of the guideposts: "The disparity between the harm (**or potential harm**[1]) suffered by the plaintiff . . . " (Opinion, p. 25.)

If this Court's opinion is correct, then the jury instructions submitted to this jury in this as well as, to every other California jury considering punitive damages in California, is wrong. That instruction reads: "That the punitive damages must bear a reasonable relationship to the injury, harm or damage actually suffered by the plaintiffs." (XIII, 3800:14-16.) if this court is correct then this instruction should read that punitive damages must bear a reasonable relationship to the amount of your award of compensatory damages.

"Injury, harm and damage" for purposes of determining punitive damages has never been limited in California to the amount of the compensatory damage award. The court in *Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598 explored this issue. The court cited cases awarding punitive damages in which there was no award of compensatory damages or where the plaintiff recovered only equitable relief or only nominal damages. (*Gagnon v. Continental Casualty Co., supra,* 211 Cal.App.3d at 1604.) The Court went on to state language which has been cited repeatedly by California courts.

> "Despite the pervasive use of the ratio method, our Supreme Court long ago opined that there is no fixed ratio by which to determine the reasonableness of the relationship between punitive damages and the actual harm suffered." (Cites omitted.)

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[1] Throughout this brief, the emphasis in quotations from decisions are the author's; not the Court's.

> Consistent with this comment is the generally accepted view that the calculation of punitive damages does not involve strict adherence to a rigid formula but instead involves "a fluid process of adding or subtracting depending upon the nature of the acts and **the effect on the parties** and the worth of the defendants." (Cites omitted)[2]
>
> In the final analysis, therefore, the propriety and amount of punitive damages depends entirely upon the particular facts of the case. Thus, to meaningfully apply the "reasonable relation" rule, **the trier of fact (and reviewing court) should not focus on some bottom-line amount of an award of compensatory damages, but on the nature and degree of the actual harm suffered by the plaintiff (and perhaps others).**[3]

(*Gagnon v. Continental Casualty Co., supra,* 211 Cal.App.3d at 1604.)

The analysis set forth above is in direct conflict with this Court's opinion. Further, this court's opinion is in direct conflict with the Tenth Circuit Court of Appeal and the other courts referred to at p. 2, *supra.* The Tenth Circuit Court of Appeals in *Continental Trend Researchers, Inc. v. Oxie U.S.A., Inc., supra,* 101 F.3d at 642 stated: "Nothing in *BMW* would appear to prohibit consideration of the costs of those legal proceedings in determining the constitutionality permissible limit on the punitive damage awards. (Brief, p. 48.)

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[2] This language originated in *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 998 and was quoted in *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 751; *Stevens v. Owens-Corning Fiberglass Corp.* (1996) 49 Cal.App.4th 1645, 1663-1664.

[3] This quotation was cited in *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1165; *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 751.

This Court's ruling is directly contrary to the California Supreme Court decision in *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910. There the Supreme Court in considering the amount of damages against which a punitive damage award should be measured considered the emotional distress suffered by the plaintiff decedent as a consequence of the insurance company's breach of duty. These damages were not legally recoverable by her estate, but were considered by the court in their evaluation of the injury, harm and damage caused by the defendant on the basis that it is likely that absent the law that her estate cannot recover such damages "plaintiff would have recovered a substantial additional amount in compensation for emotional distress suffered by Mrs. Neal." *Neal v. Farmers, supra*, 21 Cal.3d at 929. In *Ruffo v. Simpson* (2001) 86 Cal.App.4th 573, the court evaluating the ratio between the damages and punitive damages stated: "The punitive damages must be compared to the actual harm suffered by the decedent, not the limited economic damages recoverable by the estate. (*Neal v. Farmers, supra*, 21 Cal.3d. at 929; *Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602-1605.)" (*Ruffo v. Simpson, supra*, 86 Cal.App.4th at 623.)

There are sound reasons for including the attorneys' fees and costs awarded in this case as part of the judgment against the appellants as the "injury, damage and harm" to be considered in determining the constitutionally permissible limitation on punitive damages.

Here, the actual harm caused by Appellants' conduct was not only the compensatory damages plus interest but also attorneys' fees and costs necessary to obtain compensation for Appellants' wrongs. Appellants not only repeatedly committed egregious torts in breach of their fiduciary duty but refused to pay the ill-gotten gain back to the tenancy-in-common. Appellants fought this case with vigor. Even after the jury's resounding verdict, Appellants refused to acknowledge doing anything wrong. Appellants forced Respondents to pay legal fees and costs to obtain justice and Respondents were harmed financially by having to pay over $400,000.00 in fees and costs and yet to this day they have not recovered a dime from Appellants.

Here, because of the attorneys' fees provision in the tenancy in common agreement, the attorneys' fees were recoverable as damages against Appellants. The fact that they are damages is irrefutable. The judgment in this case was not for $165,527.63, but for $612,717.39. (AA. 57, pp. 852453; Brief; pp. 48, 49.) What conceivable difference can it matter, that the jury was only allowed to determine some of those damages? The jury was not allowed under California procedure to determine the attorneys' fees that were to be awarded. That was for the Court to determine. Whether it was determined by the jury or by the court, it is undisputed that these were "damage, injury and harm" that were suffered by Respondents. California Procedure could have provided that the jury makes a determination as to an award of attorneys' fees. If so, the compensatory damages would include the attorneys' fees and costs. How can this difference in procedure be the distinguishing factor as to what damages are to be considered in the punitive damage ratio equation?

The attorneys fees and costs award here are precise, monetary amounts and not the "potential damages" described in *TXO, Gore* and *Campbell,* which are to be considered as damages in determining the constitutionally permissible limitation on punitive damages.

If the judgment awarding attorneys fees and costs itself is not sufficient to indicate that this was the harm caused by Appellants' misconduct, then certainly it was potential damages, and these potential damages are quantified, precise and specific. If potential damages are to be considered as the Supreme Court has repeatedly stated, then the jury isn't aware of the potential damages because they are potential, the jury does not award those damages since they must determine the case based upon a preponderance of the evidence. Here, these potential damages are that the Respondents would have to hire a lawyer to prosecute their case against Appellants. But as potential damages, they need to be considered in the ratio punitive damages calculus.

In the two Tenth Circuit Court of Appeals opinions (*Continental Trend Resources, Inc., supra,* and *O'Gilvie, supra*) that utilized potential attorneys' fees in the harm, damage, injury/punitive damage equation, there is no award of attorneys' fees. Rather, the courts indicated that the **probable litigation costs** are to be considered in justifying an award of punitive damages. The *O'Gilvie v. International Playtex, Inc.* case, *supra,* cited *Binyon v. Nesseth* (1982) 646 P.2d 1043 where the Kansas Supreme Court stated: "In fixing an award of punitive damages, a jury may consider the amount of actual damages recovered, Defendant's financial condition and the *probable litigation expenses.*" (*O'Gilvie v. International Playtex, supra,* 821 F.2d at 1447.)

Here, there's nothing probable about Respondents' attorneys' fees and costs, since they were submitted to the Court, determined to be reasonable and awarded by the Court. Further, in the Tenth Circuit case and the cases cited therein, there may not have been any basis legally for obtaining an award of attorneys' fees as there is here based upon the provisions of the written tenancy-in-common agreement. In this case, Respondents' counsel argued to the jury in the punitive damage phase of the trial the significance of the cost to Respondents of having to take Appellants on in court to obtain redress for Appellants' torts.[4] Accordingly, the jury were well advised, all without objection, of the enormous litigation costs that were necessary to pursue this case. And the reason why these arguments didn't draw an objection is because a jury has a right to consider such circumstances in its consideration of the "injury, damage and harm" that has been caused by Appellants' conduct. And part of that "injury, damage and harm" was the fact that Respondents had to fight Appellant in court to get their money back thereby incurring extensive litigation expenses.

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[4] "I want you to imagine another scene at that same restaurant that he hangs out in which Mr. Oates is laughing and bragging about the fact: 'Well, you know, this probably was pretty good because, you know, this makes me immune from lawsuits. You know, that guy Bardis and Arnold, they had the temerity to sue me. Well, I taught them a lesson. I put them through a two-month trial, I sued them on cross-complaints, I cost them an enormous amount of money and, you know what they got, they got back just what the damages were that they claimed, You know, no one is going to try that again." (XIII, 3794:5-15.)

"For Mr. Oates and A&A to walk out of this courtroom having to pay compensatory damages and my client has to put in the enormous amount of time and money to prosecute this case in good faith, then Mr. Oates has won this case. He has won because he's telling the world, "You sue me, I fight you, I'll file cross-complaints that are unmeritorious and when you get out of it you will lose money because juries won't award punitive damages against me." (Vol. XIII, 3747:17-24.)

Another example supporting respondent's position is the consideration of the pre-judgment interest. This court properly considered the prejudgment interest awarded. Why? Because the damages caused by the appellants' wrongs caused the respondents to lose the loss of use of the funds that they were otherwise entitled to. In this case the Appellants' torts caused damage in the amount of $126,665.59. But that drew interest at the rate of 10 percent. So at the time of the trial the interest had grown to $38,862.04. But that interest was caused by the deprivation by the appellants of respondents' ability to use the money that had been taken from them. That caused harm. Here, to obtain the return of what was taken from them, Respondents have had to spend over $400,000.00 in attorneys' fees and costs. Just as the interest is what Respondents lost on their money that was taken from them by Appellants, the attorneys' fees and costs are additional harm and damages that they suffered in order to obtain judicial redress against appellants. If the Court is to consider interest over many years to be actual damages, then it would be inconsistent not to consider the attorney fees and costs that are necessary to obtain a judgment awarding Respondents the damages Appellants have tortuously caused them.

IV. APPELLANTS' MARKUP SCHEME BREACHED HIS FIDUCIARY DUTIES CAUSING DAMAGE TO HUNDREDS OF PARTNERS

A. The Opinion Should Be Modified To Set Forth The Correct State Of The Evidence With Regard To Appellants' Markup Scheme Potentially Damaging Hundreds Of Other Partners.

The Court's opinion omits significant probative evidence regarding potential damages to other partners caused by the Appellants' markup scheme. (Opinion, p.32.)

The evidence, as set forth in Respondents' Brief, established that Exhibit 287 is a series of documents entitled "New Job Number Request" which sets forth for each partnership the details regarding the project and the markup. (Brief, p. 6.) The form provides for approval by Buzz Oates. Appellants' executive, Larry Allbaugh, testified that the forms in Exhibit 287 are maintained so they can be sure of the markups that Buzz Oates has ordered (VIII, 2246:12-2247:19; Brief, p. 6.) He further testified that Oates has the final say as to the markups. (*Id.*) Another Oates' executive testified there was no markup for partnerships in which Oates or his family owned 100 percent of the partnership, but between 5 and 10 percent markups in other partnerships (VIII 2305:16-27, 2346:1-3; Brief, p. 6). The discriminatory treatment of partnerships between zero percent and ten percent, depending upon Oates' family's interest in the partnership, has been established. (*Id.*)

The evidence established that Oates managed 119 partnerships (Ex. 345, pp. 906-927, Brief, p. 19). The operating expenses of these partnerships, taken from Oates' 2001 financial statement, totals $119,116,725.00 (Brief, p. 19). The actual markup charges that are documented in Ex. 287, pp. 694-861, results in an average markup of 3.98% for all the partnerships. (Brief, p. 19, Attachment B). Using that as an average markup for the 119 partnerships, the markups in 2001 would have amounted to $4,559,382.00. This documentation of the enormous amount of operating expenses and accordingly the enormous amount of markups was established by the evidence (Brief, pp. 19, 20).

It is true the jury was not made privy to the contractual relationships with other partnerships, but the evidence established that appellants had no practice or procedure for telling the partners of the practice of marking up invoices. Oates admitted he didn't know the partners weren't being told. (XIII, 3713:13-23; Brief, p. 25)

The markup scheme was obviously designed to avoid detection of the markup practice. Furthermore, Oaths set the markups. There was no reference in the testimony that the markups were based upon any partnership agreement, but rather they were what Oates ordered. This court refers to BOE II as being a dummy middleman (Opinion, p. 30). Appellants' "set up BOE II as a middleman operating primarily for the purpose of skimming off profits for Oates's enrichment" (*Id.*) This Court referred to the markups as secret markups (Opinion, p. 12). What other reasonable explanation can there be for the dummy middleman funneling secret profits into an Oates company if the partnership agreements allowed the markups?

It is respectfully submitted that the opinion needs to be modified to set forth a complete version of the material evidence on this issue. Based on such a recitation of the evidence, there is a legitimate risk that there was potential damages caused by Appellants' markup scheme to hundreds of partners.

B. The Markup Scheme Represents Potential Damages To Others Which Should Have Been Included In The Reprehensibility Equation To Justify An Increased Ratio.

Admittedly, Respondents cannot quantify the damages to other partners, nor are they required to. Under the express language of *Gore*, one looks to the potential damage; (*Gore, supra,* 517 U.S. at 582; Respondent's Brief p. 49). Under the express language of *TXO*, "[i]t is appropriate to consider the **potential** harm that the defendants' conduct would have caused to its intended victim if the wrongful plan had succeeded as well as the **possible** harm to other victims that might have resulted if similar future behavior were not deterred." (*TXO, supra,* 509 U.S. at 460; Respondent's Brief p. 50.)

The potential harm to others as described in *TXO* and *Gore* were not proven with any greater specificity or proof of actual damages than have been proven here. Here, on the other hand, the amount of markups can be specifically determined by reference to Exhibit 287 and the operating expenses are set forth in the financial statements. (Exhibit 345, pp. 906-927; Brief, p. 19.)

These admittedly speculative but yet possible damages caused by egregious tortuous conduct must be considered by the court in determining the alleged excessiveness of a punitive damage award. The Opinion states: "Furthermore, to include speculative damages suffered by other potential plaintiffs in the calculus would run directly contrary to the Supreme Court's admonition in *Campbell* that "[a] defendant should be punished for the conduct that harmed the plaintiff; not for being an unsavory individual or business." (Opinion, p. 32.) This court's quotation from *Campbell* was preceded in *Campbell* by the statement: "The courts awarded punitive damages to punish and deter conduct that bore no relation to the *Campbells'* harm. A defendant's **dissimilar acts, independent from the acts upon which liability is premised**, may not serve as the basis for punitive damages. (*Campbell, supra*, 538 U.S. at 422.) The *Campbell* opinion goes on to state: "Although evidence of other acts **need not be identical to have relevance in the calculation of punitive damages**, the Utah court erred here because evidence pertaining to claims that had nothing to do with the third party lawsuit was introduced at length" (*Campbell, supra*, 538 U.S. at 423,424).

Here, evidence was introduced of a massive markup scheme involving hundreds of other partnerships by the same convoluted invoice scam, with a dummy corporation which marked up invoices for which they performed no services whatsoever. It was the same discriminatory markups to many partnerships. Respondents respectfully submit that the evidence introduced here with regard to the markups affecting Respondents are the **same identical frauds and concealments that were committed upon hundreds of other partners**.

It is respectfully submitted that the potential harm to hundreds of other partners here is identical to the actual harm to Respondents. Further, under the analysis of *Campbell, TXO* and *Gore,* this potential harm must be part and parcel of the punitive damage calculus in determining the appropriate amount to award against Appellants on the basis that "*possible* harm to other victims might have resulted if similar future behavior were not deterred." (*TXO, supra,* 509 U.S. at 460; Brief p. 50.) That was the purpose for the jury's resounding award. To stop Appellants from ever again cheating their fiduciary partners.

It is respectfully submitted that the potential damages caused to others is a significant feature of this case that needs to be taken into the punitive damage/ratio calculus by this Court.

V. APPELLANTS' ATTEMPTS TO OBSTRUCT JUSTICE HAVE BEEN OMITTED FROM THE OPINION AND SHOULD BE DESCRIBED IN THE OPINION AND CONSIDERED IN THE REPREHENSIBILITY EQUATION.

In describing Appellants' reprehensibility, this court has omitted the evidence which established defendants' attempts to obstruct justice, including repeatedly perjuring themselves. Appellants, including Oates, repeatedly lied that BOE II didn't make a profit. (Brief, pp. 18-19) when in fact the evidence established it made $10 million in 2000 and $9.7 million in 2001. (Brief, p. 18.) Appellants perjured themselves claiming Oates was not the mastermind behind the Ewing kickback scam but, rather, sacrificed Kevin as the scapegoat. (See Brief, pp. 15-18.) The significance of these attempts to obstruct justice is that it adds another dimension to Appellants' reprehensibility. Respondents request that the opinion be modified to state that the evidence supported the conclusion that appellants attempted to obstruct justice and lied about serious material matters. Further, these factors need to be considered by the court to increase the egregiousness of Appellants' reprehensibility.

VI. APPELLANT OATES HARBORED ACTUAL MALICE TOWARDS RESPONDENT BARDIS WHICH WAS OMITTED FROM THE OPINION AND SHOULD BE DESCRIBED IN THE OPINION AND CONSIDERED IN THE REPREHENSIBILITY EQUATION.

The opinion also omits reference to the evidence which established that Oates harbored actual malice, not implied malice, towards Appellant Bardis as documented in Respondents' Brief pp. 9, 10, 24.

Respondents request that the opinion be modified to include the reasonable inference from the evidence that Oates harbored actual malice towards Respondent Bardis. The significance of findings of actual malice and attempting to obstruct justice are two important factors which Respondents respectfully submit make Appellants' conduct **extremely** reprehensible compared to this court's conclusion of high reprehensibility (Opinion, p. 31).

VII. APPELLANTS' FRAUD AND DECEPTION WERE HARD TO DETECT AND THE OPINION SHOULD BE MODIFIED TO REFLECT THIS FACT AND CONSIDERED IN THE REPREHENSIBILITY EQUATION.

This court found that there was no basis for concluding that "the injury was especially hard to detect."

The court, in evaluating the evidence, stated "Oates used BOE II as a dummy middleman to mark up invoices." (Opinion, p. 12.) The convoluted procedure for paying a simple invoice, combined with setting up a dummy middleman screams out "concealment and deception," (Brief, pp. 4, 5). "As a result, instead of paying the face amount of the invoices, the partnership was charged **a secret** markup which was funneled directly into an Oates controlled company." (Opinion, p. 12) With the advantage of hindsight after extensive discovery, this labyrinthine scheme was uncovered. But the whole purpose of the convoluted scheme of invoices was that no one could tell by looking at the financial statements that BOE II was even involved, let alone that they were acting as a concerned middleman as "part of a systematic pattern by dates of billing his partners out of funds legitimately belonging to the partnership," (Opinion, p. 30; Brief, pp. 3-6.) It is respectfully submitted that it was hard to detect the deception because no partner would think that Oates would callously cheat them. The scheme was uncovered when Bardis became suspicious because of his discovery of the Ewing kickback. The fact that the injury was hard to detect is another factor increasing the reprehensibility meter.

The Court's statement that the injury was not especially hard to detect does not take into account that in the Ewing kickback. All of the documentation showed that the commission was going to CB Commercial; it was all concealed that there was an undisclosed kickback. The kickback was secret. It was not easy to detect or even suspect. A fortuitous circumstance allowed Bardis to stumble onto the kickback (Brief, pp. 9-12.)

In the Cottonwood commission scam, there was no way that Respondents were privy to the documentation as to what was occurring between the broker and Oates and Ramos regarding their solely owned parcels. Respondents weren't owners of those parcels. They had no way of knowing that the tenancy-in-common was paying the whole commission for the four parcels. This again was not easy to detect or even suspect. Again, this was discovered once Bardis got wind of the potential kickback when everything Oates did was carefully scrutinized (Brief, pp. 12-14) From the standpoint of hindsight, no wrong is difficult to detect. It is respectfully submitted that the Opinion should be modified to set forth that in actuality the markup scheme, the Ewing commission scam and the breach of fiduciary duty in the Cottonwood transaction were in fact hard to detect.

VIII. CONCLUSION

Respondents request the Court to consider the attorney fees and costs portion of the judgment in its damage/punitive damage calculus.

Respondents respect the Court's view that the reprehensibility was high (Opinion, p. 31). However, Respondents ask the Court to reconsider their opinion. Respondents request that the Court evaluate:

(1) Respondents' claim of serious injury, harm and damage potentially caused to hundreds of other partners as discussed at pp. 10-14, *supra*;

(2) The actual obstruction of justice through perjury that goes hand in glove with Appellants' deceit with the markup scam and the Ewing and Cottonwood transactions as set forth at p. 14, *supra*;

(3) The actual malice that Oates harbored towards Respondent Bardis as set forth at pp. 14-15, *supra*,

(4) That the injuries (markups/Ewing commission/Cottonwood commission) were hard to detect or even

suspect especially since Appellants were fiduciaries to Respondents as set forth at pp. 15-16, *supra.*

Respondents entrusted a huge investment to the safekeeping of Appellants. Appellants grossly abused that trust at every opportunity. This is a case of fiduciary fraud and concealment of the worst possible kind which is only accentuated by Appellants' obstruction of justice and actual malice. It is respectfully submitted that the Court should consider that the reprehensibility of the Appellants here is **extreme** rather than high and, that this warrants a double digit ratio.

This Court was justifiably concerned that a four to one ratio would only award $660,000 in punitive damages. The Court indicated that this is less than one percent of Oates's net worth. (Opinion, p. 38.) Because of the magnitude of Oates's worth, just assuming it was $600 million, one percent of his worth is $6 million. Accordingly, the $660,000 proposed award really represents 11/10,000ths of Oates' wealth. The reduced award of $1,071,450 is 17/10,000ths of Oates' wealth. The difference is an increase of $411,450. It is respectfully submitted that the Court's concern that $660,000 would be "tantamount to a slap on the wrist" (Opinion, p. 31) applies with equal force to an award of $1,071,450. To put in perspective how $1,071,450 is chump change to a person worth $600,000,000, examine what that ratio would yield if Oates was worth $10 million. The same ratio that is used here to punish and deter Oates would cost a person worth $10 million $17,850. If Oates was worth $50 million, the same ratio would cost him $89,250.

Respondents respectfully ask this Court to reconsider its reduction of the award of punitive damages against

Oates. This Court has appropriately cited *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757 and *Adams vs. Murakami* (1991) 54 Cal.3d 105 (Opinion, pp. 36-37). The public policy of this State as set forth in these cases cannot be accomplished by an award of $1,071,450 against an individual worth between $600 million to $800 million dollars for the enormity of the egregious conduct perpetrated here by fiduciaries. The reduced award against Oates is no more than a slap on the wrist.

DATED: June 11, 2004. Respectfully submitted,

FREIDBERG & PARKER

By: /s/ Edward Freidberg
Edward Freidberg

CERTIFICATION OF COMPLIANCE PURSUANT TO CRC RULE 14(c)(1)

Pursuant to California Rules of Court Rule 14(c)(1), and in reliance upon the word count feature of the software used, I certify that the Respondents' Petition for Rehearing is proportionately spaced, has a typeface of 13 points or more, and contains 5,185 words, including footnotes.

DATED: June 11, 2004

FREIDBERG & PARKER

By: /s/ Edward Freidberg
EDWARD FREIDBERG
650 University Ave., Ste. 205
Sacramento, CA 95825

Bardis, et al. v. Oates, et al.
(Sacramento Case No. 01AS03250)
Third District Court of Appeal Case No. C043040

PROOF OF SERVICE

I am over the age of eighteen years and not a party to this action. My business address is: 650 University Avenue, Suite 205, Sacramento, CA 95825.

On the date specified below, I caused the following documents to be sewed:

RESPONDENTS' PETITION FOR REHEARING

[XX] [BY MAIL] I am employed in the County were the mailing described below occurred, and am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Services. I placed a true copy thereof [to which was attached a copy of this document(s)] in a sealed envelope(s) with postage thereon fully prepaid. The envelope(s) will be deposited with the United States Postal Service on this day in the ordinary course of business in Sacramento, California, following ordinary business practices.

[ ] [BY FACSIMILE AND MAIL] I caused the document(s) listed above to be served by telefaxing said document(s) to the number(s) listed below at the location(s) shown as follows and also placed the document(s) in a sealed envelope(s) with postage thereon fully prepaid and deposited the envelope(s) with the United States Postal Service (as described in service by mail above.

[ ] [BY FEDERAL EXPRESS] I caused the document(s) to be served by placing a true copy thereof

[to which was attached a copy of this document(s)] in a sealed Federal Express overnight envelope bearing Airbill No.. The overnight envelope was then picked up by a Federal Express employee at the above address in Sacramento, California, and was addressed as listed below:

The envelope(s) was addressed to the following:

M. Max Steinheimer, Esq.
Rhonda Cate Canby, Esq.
Downey Brand LLP
555 Capitol Mall, 10th Flr.
Sacramento, CA 95814-4686

Jerome B. Falk, Jr., Esq.
Steven L. Mayer, Esq.
Howard, Rice, Nemerovski, et al.
Three Embarcadero Center, 7th Flr.
San Francisco, CA 94111

The Honorable Lloyd A. Phillips
Sacramento County Superior Court
720 Ninth Street
Sacramento, CA 95814

I, MAXANNE M. ADKISON, declare under penalty of perjury that the foregoing is true and correct. Executed on June 11, 2004 at Sacramento, California.

/s/ Maxanne M. Adkison
MAXANNE M. ADKISON

[XX] [BY PERSONAL SERVICE] I caused such envelope(s) to be delivered by hand to the addressee(s) listed below.

Supreme Court of California **(5 copies of Petition)**
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I, Andrey Zolnikov, declare under penalty of perjury that the foregoing is true and correct. Executed on June 11, 2004 at Sacramento, California.

/s/ Andrey Zolnikov
ANDREY ZOLNIKOV

California Supreme Court Case No.:

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CHRISTO BARDIS and LLOYD and
NANCY ARNOLD, a Limited Partnership
Plaintiffs and Respondents,

v.

MARVIN L. OATES, et al.,
Defendants and Appellants.

PETITION FOR REVIEW

(Filed Jul. 6, 2004)

From The Decision of the Court of Appeal,
Third Appellate District
No. C043040

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TO THE HONORABLE CHIEF JUSTICE RONALD M. GEORGE AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

CHRISTO BARDIS and LLOYD and NANCY ARNOLD, a Limited Partnership, Plaintiffs/Respondents in Sacramento County Superior Court Case No. 01AS03250, hereby petition this Court for review of the decision of the California Court of Appeal, Third Appellate District, filed May 28, 2004, reducing the punitive damage award but affirming the judgment in all other respects. (Exhibit A hereto, hereinafter "Opinion.")

I. ISSUES PRESENTED FOR REVIEW

1. Is the constitutionally permissible limit of a punitive damage award restricted to a single digit ratio where the defendant intentionally breached his fiduciary

duties to his partners in three separate fraudulent scams with actual malice, attempted to obstruct justice by perjuring himself in his trial testimony, showed no remorse for his actions, believed he has done no wrong, and where the reduced punitive damage award represents 25/10,000th of his wealth?

2. Is that portion of the judgment that awarded attorneys' fees and recoverable costs to be considered as "injury, damage and harm" in determining the constitutionally permissible limit of the punitive damage award?

3. Should the damages caused to hundreds of other partners by the identical egregious conduct which was the basis for imposing liability against defendants be considered in determining the constitutional permissible limit of the punitive damage award?

II. NECESSITY FOR REVIEW

Review is needed "to secure uniformity of decision" and for "settlement of important questions of law" within the meaning of Rule 29(a)(1) of the California Rules of Court.

This case poses a case of first impression on one of the most controversial legal topics currently before this court, namely, the constitutionally permissible ratio between damages and punitive damages. It is the first published decision by any court involving a fiduciary who wantonly abused his trust by fraudulently deceiving and cheating his partners in three separate scams with, actual malice, attempted to obstruct justice through perjury, refused to accept he had done anything wrong and had no remorse for his egregious misconduct. The cases that have decided this controversial issue of the permissible ratio involve as defendants insurance companies, banks, car manufacturers and real estate holding companies; **not fiduciaries**. None of the cases establishing the law on this subject except *TXO Production vs. Alliance Resources* (1993) 509 U.S. 443 (*TXO*) involve actual malice and in *TXO* the Supreme Court affirmed a ratio of 526-1.

The Court of Appeal **limited its consideration of damages to the compensatory damages awarded by the jury** and refused to consider the portion of the judgment which awarded $447,389 of attorneys' fees and costs against defendants. This also presents a case of first impression whether a judgment that includes attorney fees and costs as part of the damages be considered for purposes of determining the constitutionally permissible limit of the punitive damage award. The Court of Appeals decision on this topic is in conflict with and contrary to:

(1) *Neal v. Fanners Ins. Exchange* (1978) 21 Cal.3d 910, *Rufo v. Simpson* (2001) 86 Cal.App.4th 573 and *Romo v. Ford Motor Co.* (2003) 113 Cal.App.4th 738 which considered harm not limited to the compensatory damages awarded for purposes of determining the constitutionally permissible ratio.

(2) *Gagnon vs. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1604; *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1165 and *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 751 which expressly recognize that the court must consider the actual harm suffered by the plaintiff and others; not the compensatory damage award.

(3) The "directions for use" and the jury instruction in the Judicial Council of California Civil Jury Instructions (2003-2004) CACI No. 3942 which do not limit the damages to be considered in determining the amount of punitive damages to the actual compensatory damages awarded by the jury.

(4) The decisions in *Continental Trend Resources, Inc. v. OXY USA, Inc.* (10th Circ. 1996) 101 F.3d 634, *O'Gilvie v. International Playtex, Inc.* (10th Circ. 1987) 821 F.2d 1438, *Binyon v. Nesseth* (1982) 646 P.2d 1043 and in *Oglethorpe Power Corp. v. Sheriff* (GA. Ct. App. 1993) 436 S.E.2d 14, which held that attorneys fees and costs should be considered as part of the damages in determining the constitutionally permissible limit of the punitive damage award.

(5) The express recognition by the three United States Supreme Court decisions[1] that the jury may consider harm which is potential and are not limited to the actual compensatory damage award.

The refusal of the District Court of Appeal to consider the potential damages to other partners caused by the same scheme that was perpetrated upon the plaintiffs for purposes of determining the permissible punitive damage award is inconsistent with and conflicts with the United States Supreme Court decisions in *TXO, Gore*, and *Campbell* as well as a number of California cases, including *Simon vs. San Paolo United States Holding Co., Inc.*

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[1] *TXO, supra,* 509 U.S. at 458; *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 582 *(Gore);* and *State Farm Mutual Insurance v. Campbell* (2003) 538 U.S. 408, 424, 425 *(Campbell).*

(2003) 113 Cal.App.4th 1137 which is presently before this court.

III. FACTS ESSENTIAL TO THE PETITION

Defendant Marvin "Buzz" Oates (Oates) is a successful real estate developer who controls a family of satellite companies. These include a real estate brokerage firm, Buzz Oates Real Estate Company (BORE), a management firm known as A & A Properties (A & A) and a construction company known as BOE II (Opinion, p. 2.) Plaintiff Christo Bardis (Bardis) is a real estate developer who together with Lloyd Arnold[2] entered into a partnership with Oates and another individual, Frank Ramos, to purchase a 300-acre tract of land in Orange County consisting of a horse racetrack, golf course and industrial area (Opinion, p. 3), Bardis managed the partnership from 1989 to 1994 when Oates took over as manager (Opinion, p. 4). The original partnership dissolved in 1997 and a tenancy in common (TIC) was formed with Bardis and Arnold taking certain parcels of land, Oates and Ramos taking other parcels and the TIC retaining the remaining parcels (Opinion, p. 4).

A. MARKUP SCHEME

The TIC agreement provided that the managing partner, Oates, would receive a $500-per-month fee for managing the property (Opinion, p. 5). Oates devised a mark-up scheme in which he would have A & A receive the TIC's vendor invoices and instead of paying them directly from the TIC's account, tender them to BOE II, a division of A & A, which marked up the invoices by 5% or more. The markup for services of an engineering consultant and a contract attorney were 100% and 50% respectively. Oates concealed these markups from Bardis and Arnold (Opinion, p. 6).[3] BOE II was used by Oates as dummy middleman to mark up the invoices so that instead of the TIC paying the actual face value of the invoices, it was charged a secret markup which was funneled to BOE II, an Oates controlled company. (Opinion, p. 12), The Court of Appeal determined that "[t]he jury could find that the markups were part of a systematic pattern by Oates of bilking his partners out of funds legitimately belonging to the partnership. He repeatedly fleeced the partnership to line his own pockets" (Opinion, p. 30).

---

[2] Arnold is the general partner of Plaintiff Lloyd and Nancy Arnold Limited Partnership (Arnold) (Opinion, p. 3, fn. 1.)

The jury unanimously found both defendants liable for intentional breach of fiduciary duty and Oates liable for breach of contract for the markups (AA 20, pp. 221, 222).

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[3] Exhibit 327 shows defendants' scheme of concealment. As illustrated, a vendor invoice is presented to the partnership for payment. The invoice then proceeds to BOE II, which creates a marked-up invoice as shown in Ex. 97-2. BOE II marks up the invoice between 5 and 100 percent, and presents the invoice to A & A, which issues a check to BOE II to pay the marked-up invoice. (Exs. 97-1, pp. 122-424; 97-2, pp. 433-682; 139, p. 685.) Next, BOE II deposits the A & A check in its account. Then A & A writes a check from the partnership or TIC account to itself reimbursing the payment of the marked-up BOE II invoice. (Ex. 139, p. 686.) Finally, A & A deposits the partnership check in its own account and BOE II pays the vendor from BOE II's account. (VIII 2397:3 – IX 2408:14; 2411:13-2421:7.) For example, a water bill for $97,673 owed by the partnership was provided to BOE II. (Ex. 97-1, p. 371.) Next, BOE II marked up the invoice by 5 percent to $102,556.65. (Ex. 97-2, p. 646.) The partnership paid A & A the marked-up BOE II bill and BOE II captured the profit of $4,883.65.

B. MARKUP SCHEME DAMAGES HUNDREDS OF PARTNERS

Exhibit 287 is a series of documents entitled "New Job Number Request" which sets forth for each partnership the details regarding the project and the markup. The form provides for approval by Oates (Exh. 287, pp. 694-861). Appellants' executive, Larry Allbaugh, testified that the forms in Exhibit 287 are maintained so they can be sure of the markups that Oates has ordered (VIII[4], 2246:12-2247:19), (Petition for Rehearing (Pet. for Reh.), p. 10). He further testified that Oates has the final say as to the markups. (*Id.*) Another Oates' executive testified there was no markup for partnerships in which Oates or his family owned 100 percent of the partnership, but between 5 and 10 percent markups for other partnerships (VIII 2305:16-27, 2346:1-3, *Id.*)

The evidence established that Oates managed 119 partnerships. (Ex. 345, pp. 906-927, Pet. for Reh., p. 11.) The operating expenses of these partnerships, taken from Oates' 2001 financial statement, totals $119,116,725. (*Id.*) The actual markup charges that are documented in Ex. 287, pp. 694-861, results in an average markup of 3.98% for all the partnerships. Using that as an average markup for the 119 partnerships, the markups in 2001 would have amounted to $4,559,382. (*Id.*)

It is true the jury was not made privy to the contractual relationships with other partnerships, but the evidence established that appellants had no practice or procedure for telling the partners of the practice of marking up invoices.

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[4] Roman numerals before a page and line citation refer to the volume number of the reporter's transcript.

Oates admitted he didn't know the partners weren't being told. (XI 3060:18-3061:14; XIII 3713:13-23, *Id.*) The Court of Appeals concluded that "Oates violated these covenants (partnership agreement) in diverting partnership funds to BOE II through A & A without the knowledge of the other partners." (Opinion, p. 14.) The Court referred to the markups as secret markups (Opinion, p. 12).

What other reasonable explanation can there be for the labyrinthine procedure for paying a simple invoice using a dummy middleman to funnel secret profits into an Oates company if the partnership agreements of the other 119 partnerships allowed the markups? Neither the partnership agreement nor the TIC agreement allowed for any markup. (Opinion, p. 14.) Yet defendants charged markups to the partnership and TIC in this case. Accordingly, there is substantial evidence to support the inference that defendants did not have the right to mark up invoices in the other partnerships.

C. THE EWING COMMISSION KICKBACK

The Partnership and TIC Agreements do not provide for any compensation to the manager except as approved by unanimous vote of the partners with the exception of the $500 management fee for the TIC. (Opinion, pp. 4, 5). Bardis, during his management of the partnership, never claimed nor took any real estate commission for the sale of partnership real property. (I 289:2-18; III 1921:2-9.)

A prospective buyer for the parcel owned by the TIC contacted BORE. (Ex. 16, 43, ¶ 11, p. 925 AA)[5] Previously, Bardis had made it abundantly clear that he was not going to allow Oates or BORE to receive a realtor's commission on the sale of TIC properties. (I 289:12-18; VII 1921:2-9.) Although no broker represented the buyer, BORE entered into an agreement with CB Commercial (CBC) to provide a commission on the sale to CBC, who had not procured the buyer, with the understanding that BORE would get a 60% kickback of the commission from CBC (Opinion, p. 7.) The sale documentation deliberately concealed from the TIC partners the kickback arrangement between CBC and BORE since it provided that CBC would receive the entire commission. (Ex. 2, p. 865 AA, Opinion, P-7.) The kickback commission was concealed in all documentation for the purpose of deceiving Bardis (Opinion, p. 71. After the transaction closed, CBC sent a check for $122,090 to BORE which was the kickback, (Ex. 1, p. 864 AA.) In order to obtain the $122,090 kickback, Oates gave a commission of $81,394 to CBC to which they were not entitled.[6]

The jury unanimously found the defendants liable for intentional breach of fiduciary duty, intentional interference with economic advantage, intentional misrepresentation and fraudulent concealment on this transaction. (AA, 20, pp. 217-225.)

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[5] AA refers to Appellant's Appendix.

RA refers to the Respondent's Appendix.

Ex. refers to a trial exhibit.

[6] The $203,483 commission payable to CBC minus the $122,090 kickback equals $81,394 that CBC profited from the deception.

D. COTTONWOOD COMMISSION SCAM

Later, the last remaining parcel of TIC property was sold to the Cottonwood Christian Center (Cottonwood). The Cottonwood offer included not only the TIC owned Parcel 3 but also adjacent Parcels 4, 5 and 6 which were owned by Ramos and Bardis (Ex. 56, pp. 89-104 RA). In this transaction the buyer was represented by its own realtor and CBC represented the seller (Opinion, p. 8). Initially, the commission split was 1% on all of the four parcels to be split among the owners to CBC and 1% to BORE. However, Kevin Ramos of BORE knew that there would be a problem with Bardis if BORE received any commission on TIC property (Opinion, p. 8). Accordingly, Ramos renegotiated the commission with CBC so that CBC received a 2% seller's commission on Parcel 3 and BORE received a 2% seller's commission on Parcels 4, 5 and 6. The net effect was to shift the obligation to pay CBC's commission prorated among all four parcels to the TIC exclusively while BORE received its full commission from the Oates-Ramos parcels (Opinion, pp. 8, 9). CBC, who was entitled to a commission on Parcels 4, 5 and 6 received a larger commission for the sale of Parcel 3 and no commission from Oates and Ramos, the owners of Parcels 4, 5 and 6. Had Bardis known about the secret deal he would have vetoed the sale (Opinion, pp. 8, 9). The net effect of the commission split was to place an unequal burden on the TIC partners while allowing Oates to avoid paying any commission to CBC on the sale of the three parcels he co-owned with Ramos (Opinion, pp. 18, 19).

The jury found defendants liable for intentional interference with economic advantage, intentional misrepresentation, fraudulent concealment and intentional breach of fiduciary duty on this transaction (Opinion, p. 9).

E. REPREHENSIBILITY

The Opinion states that "[t]he jury could find that the kickbacks, markups and concealed commissions were part of the systematic pattern by Oates of bilking his partners of funds legitimately belonging to the partnership" (Opinion, p. 30). The Court of Appeals concluded that "[t]he record also overwhelmingly supports a finding that the harm was caused as the result of intentional fraud, malice and deceit" (Opinion, p. 30) and that "[t]he jury verdict leaves no doubt that Oates committed egregious misconduct." (Opinion, p. 33).

1. OATES UNREPENTANT AT TRIAL

Oates "repeatedly fleeced the partnership to line his own pockets. Oates was unrepentant at trial, insisting that 'in [his] heart' he believed he did nothing wrong." (Opinion, p. 30.)

2. OATES HARBORED ACTUAL MALICE TOWARD BARDIS

In a meeting held in late 1997, tension between Oates and Bardis escalated to a level in which they screamed profanities at each other, causing Oates to stomp out of his own office. (I 247:5-248:16; IV 958:1-21; V 1311:5-10; VII 913:23-1914:5, Pet. for Reh., p. 15.) Since that explosive meeting, Oates and Bardis have not spoken to one another. (*Id.*)

The fraudulent concealments, intentional breaches of fiduciary duties and other torts found by the jury in the Ewing commission kickback and the Cottonwood commission all occurred after the 1997 meeting (Ewing sale 1998 [Ex. 2, p. 865 AA]; Cottonwood sale 1999 [Ex. 59, p. 1047 AA].)

Bardis, along with his niece and nephew, walked past Oates and his companions who were seated at a table in a

Sacramento restaurant. Loud enough for all to hear, Oates called Bardis the biggest asshole in town. (X 2704:18-2705:11; V 1312:1-16, Pet. for Reh., p. 14.) In another episode in a beauty salon, within earshot of Bardis' niece, Oates again reiterated that her uncle was the biggest asshole in town. (X 2704:5-17, Pet. for Reh., p. 14.)

3. OATES ATTEMPTS TO OBSTRUCT JUSTICE

The defense theme was that BOE II was a service organization that enabled Oates to build buildings for his partnerships at the lowest cost; that it was never intended to make a profit and that it never made a profit. (I 140:13-14; 141:12-17; 175:27-176:1; III 769:26-28; 770:8-20; 778:5-25; Pet. for Reh., p. 14.) Oates claimed that the markups merely reimbursed BOE II for overhead costs (Opinion, p. 12). The Court of Appeal dismissed this claim stating Oates' "self-serving, post hoc explanation that he was reimbursing himself for 'overhead' was entitled to, and received, no weight by the jury." (Opinion, p. 14.)

In the punitive damages trial, Oates was required to produce his financial statements. (XIII 3652:5-3654:24, Pet. for Reh., p. 14.) Those financial statements tell an astonishing story. Rather than being a profitless corporation with the markups barely paying the overhead, BOE II had a net income of $10,495,457 for the year ending December 31, 2000. (Ex. 344, p. 873) In 2001, BOE II had a net income of $9,717,465. (Ex. 345, p. 907, Pet. for Reh., p. 14.)

4. DEFENDANT'S FRAUDS HARD TO DETECT

The court found "no basis for concluding that the injury was especially hard to detect." (Opinion, p. 32.) Yet the convoluted procedure for paying a simple invoice, combined with setting up a dummy middleman screams out concealment and deception. The Court of Appeals agreed, stating: "As a result, instead of paying the face amount of the invoices, the partnership was charged a secret markup which was funneled directly into an Oates controlled company." (Opinion, p. 12.) With the advantage of hindsight after extensive discovery, this labyrinthine scheme was uncovered. But the whole purpose of the convoluted scheme was that no one could tell by looking at the financial statements that BOE II was even involved, let alone that they had been "set up as a middleman operating primarily for the purpose of skimming off profits for Oates's enrichment." (Opinion, pp. 30, 31.) It is respectfully submitted that it was hard to detect the deception. because no partner would think that a man of Oates's stature and wealth, would callously cheat them.

Further, the Court's finding that the injury was not especially hard to detect does not take into account that in the Ewing kickback all of the documentation showed that the commission was going to CBC. The kickback was secret. It was not easy to even suspect, let alone detect.

In the Cottonwood commission scam, there was no way that plaintiffs were privy to the documentation between CBC and Oates and Ramos regarding their solely owned parcels. Plaintiffs were not owners of those parcels. They had no way of knowing that the TIC was paying the whole commission for the four parcels. This again was not easy to suspect or detect.

F. JUDGMENT

The jury found that the plaintiffs were damaged in the amount of $165,527.63 (Opinion, p. 10). The court awarded plaintiffs an additional $407,947.50 for attorneys' fees and

$39,242.26 as recoverable costs for a total judgment against defendants of $612,717.39. (Pet. for Reh., p. 2; AA 852, 853.)

G. PUNITIVE DAMAGE AWARD

The jury found that Oates and A & A committed "malice, oppression or fraud" in the conduct which formed the basis of the compensatory damage award (Opinion, p. 21).

There was evidence that Oates's net worth was between $600 million to $800 million. A Forbes Magazine article ranked Oates 288th on a list of the nation's 400 wealthiest individuals, estimating his worth at $800 million. Oates claims he told Forbes he was worth only $600 million to $650 million (Opinion, p. 31. fn. 9).

The jury awarded $5 million in punitive damages against Oates and $2 million against A & A (Opinion, p. 29, fn. 8).

IV. LEGAL DISCUSSION

A. THE APPEALS COURT ERRONEOUSLY FELT BOUND BY *CAMPBELL'S* DICTA NOT TO EXCEED A SINGLE-DIGIT RATIO. BUT *CAMPBELL* DID NOT OVERRULE OR DISAPPROVE *TXO*. *TXO'S* ANALYSIS, RATIONALE AND HOLDING IS THE APPLICABLE AUTHORITY TO CONSTITUTIONALLY EVALUATE A PUNITIVE DAMAGE AWARD AGAINST A FIDUCIARY WHO TORTIOUSLY CHEATED HIS PARTNERS WITH ACTUAL MALICE.

The Supreme Court decisions which have considered the controversial issue of the constitutionally permissible ratio between damages and punitive damages involve defendants who are a health insurance company (*Pacific Mutual Life Insurance Co. v. Haslip* (1991) 499 U.S. 1) *(Haslip)*; an oil and gas development company (*TXO;* an automobile manufacturer *(Gore)*; and an automobile liability insurance company *(Campbell)*. The California appellate decisions on this topic involve defendants who are an automobile manufacturer *(Romo* (2003) 113 Cal.App.4th 738) and an insurance company *(Diamond Woodworks, Inc. v. Argonaut, Ins. Co.* (2003) 109 Cal.App.4th 1020). Currently before this court on a grant of a Petition for Review addressing this same issue are defendants who are a cigarette manufacturer (*Henley v. Phillip Morris, Inc.* (2004) 114 Cal.App.4th 1429; an automobile manufacturer (*Johnson v. Ford Motor Company* (2003) WL 22794432; and a real estate holding company owned by a bank (*Simon v. San Paolo United States Holding Co., Inc.* (2003) 113 Cal.App.4th 1137.

None of these cases involve a fiduciary. None of these cases other than *TXO* involve actual malice. None of them involve a scheme by an enormously wealthy fiduciary to blatantly cheat his partners in three separate and distinct scams.

The analysis articulated in *Gore* and *Campbell* deal with actionable conduct revolving around nationwide corporate policy. The Court of Appeals recognized that the challenged corporate policy in *Gore* was actually legal in other states (Opinion, p. 25). The Court recognized that "the shock value of defendant's conduct in *Gore*, however, was minimal . . ." (*Id.*) Further, in *Gore* the manufacturer stopped the alleged prohibited conduct upon discovering that it was prohibited. (*Gore, supra,* 517 U.S. 559, 579.) This case bears no resemblance to the minimally reprehensible corporate policy of the automotive manufacturer in *Gore*.

Nor does this case bear any resemblance to the bad faith refusal to settle a claim against an insured which was the basis for liability in *Campbell*. Neither *Gore* nor *Campbell* remotely resemble the high degree of reprehensibility in this case. Neither defendant in those cases had any actual malice towards the plaintiff. Neither defendant was a fiduciary to the plaintiff.

In *TXO*, on the other hand, the defendant's reprehensibility is best illustrated by Justice Kennedy's concurring opinion:

> There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: **TXO acted with malice**. This was not a case of negligence, strict liability, or respondeat superior. **TXO was found to have committed, through its senior officers, the intentional tort of slander of title.** The evidence at trial demonstrated that it acted, in the West Virginia Supreme Court of Appeals' words, through **a 'pattern and practice of fraud, trickery and deceit' and employed 'unsavory and malicious practices' in the course of its business dealings with respondent.** [Citations] [¶] But given the record here, "I am satisfied that the jury's punitive damages award did not amount to an unfair, arbitrary or irrational seizure of TXO's property.

TXO, supra, 509 U.S. at 468, 469.[7]

Accordingly, in 1993 Justice Kennedy, the author of the *Campell* decision, concurred in affirming a punitive damage ratio of 526 times the actual damages.

In *Zhang v. American Gem Seafoods. Inc.* (9th Cir. 2003) 339 F.3d 1020, the Ninth Circuit recognized the critical significance of the degree of reprehensibility between the case before it and *Gore* and *Campbell,* stating:

> **The gulf between the reprehensibility of the corporate defendants' actions here and the conduct at issue in *BMW, Copper Industries* and State *Farm,* however, is substantial.** In *BMW,* the defendant automaker had fraudulently failed to disclose its practice of selling cars as new after repairing minor predelivery damage. [Citations] In *Cooper Industries,* the defendant had been found liable for falsely advertising another competitor's products as its own. [Citations] In *State Farm,* the defendant insurance company had implemented a fraudulent policy of limiting costs by refusing to settle insurance claims and then capping claims payments after losing at trial. [Citations] Although the plaintiffs in *State Farm* did allege emotional distress, [citations], the reprehensibility of the fraudulent business practices at issue in these Supreme Court cases is **different in kind** from the reprehensibility of intentional discrimination on the basis of race or ethnicity.

(*Zhang, supra,* 339 F.3d at 1043.)

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[7] Throughout this petition emphasis in court decisions are the author's; not the court's.

In this case, as in *Zhang,* the gulf between the reprehensibility of the defendants' conduct here and the conduct at issue in *Gore* and *Campbell* is substantial. In this case, as in *Zhang,* the reprehensibility here is different in kind from the conduct in issue in *Gore* and *Campbell.*

The corporate policy "frauds" in *Campbell* and *Gore* pale in comparison to the malicious conduct in this case that was perpetrated by a fiduciary upon not only the plaintiffs but hundreds of other partners.

The Court of Appeals apparently felt bound by the dicta in *Campbell* (Opinion, p. 37). But *stare decisis* teaches us that opinions are to be taken in connection with the case in which those opinions are used. If they go beyond the case, they may be respected but ought not to control the judgment in a subsequent suit. (*Humphreys Ex'r v. United States* (1935) 295 U.S. 602, 627.)

Campbell is a far different case than this case. The factual differences are monumental. The *Campbell* court did not have before it a fiduciary who intentionally breached his fiduciary duty to act in the highest good faith to his co-partner and who may not obtain any advantage over his co-partners by the slightest misrepresentation, concealment, threat or adverse pressure of any kind. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 514.) The *Campbell* court did not have before it a fiduciary committing multiple separate torts against his partners with actual malice. The *Campbell* court did not have the opportunity to evaluate and consider the ratio necessary under the facts of this case to accomplish the twin goals of a punitive damage award of punishment and deterrence when the fiduciary is worth $600 million to $800 million.

Campbell is also distinguishable since that court considered that the emotional distress damages of $1 million awarded the plaintiff tended to duplicate elements of the punitive damage award. (Opinion, p. 28; *Campbell, supra,* 538 U.S. at 426.) Here, the plaintiffs never sought emotional distress damages but clearly they suffered such damages by being subjected to the frauds and deceits by the partner they entrusted the management of their TIC.

It is respectfully submitted that *Campbell's* dicta does not apply to this case. Rather, the analysis and principles buttressing the *TXO* decision should control here.

This is an era rocked with scandal which has exposed highly respected fiduciaries who have surreptitiously and blatantly cheated. and deceived their partners and shareholders. This court needs to address and resolve the issue of the constitutionally permissible limit on punitive damage awards when enormously wealthy fiduciaries cheat their partners with malice aforethought.

To limit the ratio between damages and punitive damages to a single digit cannot accomplish the public policy of this state that decrees that the function of deterrence "will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928. "An award which is so small that it can be simply written off as a part of the cost of doing business would have no deterrent effect. An award which affects the company's pricing of its product and thereby affects its competitive advantage would serve as a deterrent" (See *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 820. See also, Opinion, p. 36.)

In this case, the policy of deterrence cannot be accomplished by reducing the punitive damages, the jury here thoughtfully awarded and the trial court concurred in the appropriateness of the award. The $1.5 million reduced award itself can be easily absorbed by Oates as part of his cost of doing business without any significant discomfort. Such an award represents about four months of unauthorized markups (p. 6, *supra*).

Nor will such a single digit multiplier comply with the Supreme Court's mandate in *Gore* that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for, an argument that **strong medicine** is required to cure the defendant's disrespect for the law." *Gore*, 517 U.S. 559, 576, 577.

The $1.5 million punishment here equals 25/10,000ths of Oates's wealth based upon his being worth $600 million. However, he testified he told Forbes Magazine that he was worth $600 million to $650 million (Opinion, p. 31, fn. 9) and the evidence was that his net worth was between $600 million and $800 million. (*Id.*) The same percentage of wealth that is supposed to punish and deter Oates (25/10,000ths) would punish a person worth $10 million, a meager $25,000. That same percentage would punish a person worth $50 million an inconsequential $125,000. Recognizing that a 4 to 1 ratio would yield only a $660,000 award, the Court of Appeals increased it to $1.5 million. This is a miniscule increase (11/10,000th compared to 25/10,000th) in view of Defendant Oates's enormous wealth. (Opinion, pp. 38, 39.) To Oates such an award is not even a slap on the wrist but is more like a sting from a gnat.

B. THE AWARD OF ATTORNEYS' FEES AND COSTS WHICH ARE PART OF THE JUDGMENT OBTAINED AGAINST THE DEFENDANTS MUST BE CONSIDERED AS DAMAGES FOR PURPOSES OF DETERMINING THE CONSTITUTIONALLY PERMISSIBLE RATIO BETWEEN DAMAGES AND PUNITIVE DAMAGES.

The Appeals Court rejected plaintiffs' argument that the court must consider the full amount of the judgment rendered against the defendants, which included $447,189 of attorneys' fees and costs, in determining the legally permissible limit of punitive damages to be awarded. Citing *Gore,* the Court of Appeals stated: "Logic and common sense tell us that the amount the jury found to be the 'total amount of damages suffered by plaintiffs' (italics added) – $165,527.63 – most closely reflects the United States Supreme Court's formulation of the 'actual harm as determined by the jury' (*Gore, supra,* 517 U.S. at p. 582.), and should be used as the base figure in calculating the ratio for punitive damages." (Opinion, pp. 22, 23.)

But *Gore, supra,* 517 U.S. 559 did not hold that the actual damages found by 'the jury are the only damages that are to be considered in calculating the ratio. The Appeal Court's citation to *Gore* is to a statement in *Gore* of a fact, not a legal opinion or directive. The *Gore* decision stated: "The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his **actual harm as determined by the jury**." (*Gore*, *supra,* 517 U.S. at p. 582.) The *Gore* decision. goes on to state:

> "Of course, we have consistently rejected the notion that the constitutional line is marked by a

> simple mathematical, formula, even one that compares actual and **potential** damages to the punitive award." *TXO,* 509 U.S. at 458."

(*Gore, supra,* 517 U.S. at 582.)

Campbell, supra, 538 U.S. at 424, 425 cites this same language.

The *TXO* court stated:

> "Taking account of the **potential harm** that might result from the defendant's conduct in calculating punitive damages was consistent with the views we expressed in *Haslip, supra*. . . . Thus, both State Supreme Court and this Court have **eschewed an approach that concentrates entirely on the relationship between actual and punitive damages**. It is appropriate to consider the magnitude of the **potential harm** that the defendant's conduct would have caused . . . (*TXO, supra,* 509 U.S. at 460, 461.)

That the damages to be considered are limited to the jury's award of compensatory damages, is contrary to the Supreme Court's decisions in *TXO, Gore* and *Campbell* which endorse considering the harm that is likely to occur as well as the harm that has actually occurred. (*TXO, supra,* 509 U.S. at 460; *Gore, supra,* 517 U.S. at 582; *Campbell, supra,* 538 U.S. at 424, 425.)

If the Court of Appeal's opinion is correct, then the jury instruction submitted to this jury is wrong. That instruction reads: "That the punitive damages must bear a reasonable relationship to the injury, harm, or damage actually suffered by the plaintiffs." (XIII, 3800:14-16.) See also CACI Instruction No. 3942. If the Court of Appeals is correct then these instructions should read that "punitive damages must bear a reasonable relationship to the amount of your award of compensatory damages."

"Injury, harm and damage" for purposes of determining punitive damages has never been limited in California to the amount of the compensatory damage award. The Court in *Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598 cited cases awarding punitive damages in which there was no award of compensatory damages or where the plaintiff recovered only equitable relief or only nominal damages. (*Gagnon v. Continental Casualty Co., supra,* 211 Cal.App.3d at 1604.) The Court went on to state:

> "Despite the pervasive use of the ratio method, our Supreme Court long ago opined that there is no fixed ratio by which to determine the reasonableness of the relationship between punitive damages and the actual harm suffered." (Cites omitted.)
>
> Consistent with this comment is the generally accepted view that the calculation of punitive damages does not involve strict adherence to a rigid formula but instead involves "a fluid process of adding or subtracting depending upon the nature of the acts and **the effect on the parties** and the worth of the defendants." (Cites omitted)[8]
>
> In the final analysis, therefore, the propriety and amount of punitive damages depends entirely upon the particular facts of the case. Thus, to

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[8] This language originated in *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 998 and was quoted in *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 751; and *Stevens v. Owens-Corning Fiberglass Corp.* (1996) 49 Cal.App.4th 1645, 1663-1664.

> meaningfully apply the "reasonable relation" rule, **the trier of fact (and reviewing court) should not focus on some bottom-line amount of an award of compensatory damages, but on the nature and degree of the actual harm suffered by the plaintiff (and perhaps others).**[9]

(*Gagnon v. Continental Casualty Co., supra,* 211 Cal.App.3d at 1604.)

The Court of Appeal's opinion is in direct conflict with the Tenth Circuit Court of Appeal and the other courts referred to at pp. 3, 4, *supra.* The Tenth Circuit Court of Appeals in *Continental Trend Researchers Inc v. Oxie U.S.A., Inc., supra,* 101 F.3d at 642 stated: "Nothing in *BMW* would appear to prohibit consideration of the costs of those legal proceedings in determining the constitutionality permissible limit on the punitive damage awards."

The Court of Appeal's ruling is directly contrary to *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910. There the Supreme Court considered the emotional distress suffered by the plaintiff decedent as a consequence of the insurance company's breach of duty in determining the amount of damages against which a punitive damage award should be measured. These damages were not legally recoverable by her estate, but were considered by the court in their evaluation of the harm caused by the defendant on the basis that it is likely that absent the law that her estate cannot recover such damages "plaintiff would have recovered a substantial additional amount in compensation for emotional distress suffered by Mrs. Neal." *Neal v. Farmers, supra,* 21 Cal.3d at 929.

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[9] This quotation was cited in *McLaughlin v. National Union Fire Ins.* Co. (1994) 23 Cal.App.4th 1132, 1165; *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 751.

In *Ruth v. Simpson* (2001) 86 Cal.App.4th 573, the court stated: "The punitive damages must be compared to the actual harm suffered by the decedent, not the limited economic damages recoverable by the estate. (*Neal v. Farmers, supra,* 21 Cal.3d at 929; *Gannon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602-1605.)" (*Rufo v. Simpson, supra.,* 86 Cal.App.4th at 623).

This court has accepted *Simon, supra,* 113 Cal.App.4th 1137 for review. In *Simon* the Court of Appeals held that although the plaintiff only recovered $5,000 since he was legally limited to only recover his out-of-pocket expenses, nevertheless, the Court considered that he had suffered at least $400,000 of damages for his loss of bargain. The Court acknowledged that such damages were not legally recoverable. The Court held that the loss of bargain damages were relevant to a determination of the harm to punitive damages ratio and that the actual compensatory damage award did not fully reflect the harm caused by the defendant's conduct. (*Simon, supra,* 113 Cal.App.4th at 1163-1165)

Here, defendants refused to pay their ill-gotten gain back to the TIC. Defendants fought this case with vigor. Even after the jury's resounding verdict Oates refused to acknowledge doing anything wrong. Defendants forced plaintiffs to pay legal fees and costs to obtain justice. Plaintiffs were harmed financially by having to pay $447,000 in fees and costs to pursue this litigation.

This case presents a stronger argument for the consideration of the attorneys' fees and costs actually awarded than the evidence of loss of bargain damages which neither the jury nor the Court awarded which nevertheless was considered by the court in *Simon, supra.* The law prevented the jury in the *Neal* case from awarding emotional distress damages suffered by the decedent, but the Supreme Court nevertheless considered those damages in determining the propriety of punitive damage award.

Petitioners here were actually awarded $447,189.76 in attorneys' fees and costs. The judgment in this case is not $165,527.63. That was the jury award. The judgment in this case is $612,717.39. (Pet. for Reh., p. 2; AA pp. 852, 853, p. 9. supra.) If the total judgment is considered as damages or harm, the ratio the appeals court felt appropriate of 9 to 1 yields a punitive damage award of $5,514,456.

The attorneys' fees provision in the TIC agreement made the attorneys' fees recoverable as damages against defendants. The jury was not allowed under California procedure to determine the attorneys' fees that were to be awarded. (*Nevin v. Salk* (1975) 45 Cal.App.3d 331, 339.) [Where a party is entitled by statute or contract to attorney's fees, the amount awarded is within the discretion of the trial court] Whether it was determined by the jury or by the court, it is undisputed that these were "damage, injury and harm" that were suffered by plaintiffs and caused by defendant's wrongs. They were necessitated by defendants' wrongful refusal to pay back what they had stolen from the TIC. California Procedure could have provided that the jury determine the award of attorneys' fees. If so, the compensatory damages would include these attorneys' fees and costs. How can this difference in procedure be the distinguishing factor as to what damages are to be considered in the harm/punitive damages ratio issue?

The attorneys fees and costs award here are precise, monetary amounts and not the "potential damages" described in *TXO, Gore* and *Campbell,* which are to be considered as damages in determining the constitutionally permissible limit of a punitive damage award.

If the judgment awarding attorneys fees and costs itself is not sufficient to establish that this was harm caused by Appellants' misconduct, then certainly they are potential damages. Here, these potential damages are that the plaintiffs would have to hire a lawyer to prosecute their case against defendants. Even as potential damages, they need to be considered in the harm/punitive damages calculus.

In the decisions cited at p. 3, *supra,* that utilized potential attorneys' fees in the harm/punitive damage equation, there was no award of attorneys' fees. Rather, the courts indicated that the **probable litigation costs** are to be considered in justifying an award of punitive damages.

Here, there is nothing probable about plaintiffs' attorneys' fees and costs, since they were submitted to the trial court and awarded by the trial court. Further, in the Tenth Circuit cases and the cases cited therein, there may not have been any basis legally for obtaining an award of attorneys' fees as there is here based upon the provisions of the written TIC agreement. In this case, plaintiffs' counsel argued to the jury in the punitive damage phase of the trial the significance of the cost to plaintiffs of having to take defendants on in court to obtain redress for defendants' torts. (Pet. for Reh., pp. 8, 9; XIII 3747:17-24, 3794:5-15. The jury was well advised, all without objection, of the enormous litigation costs that were necessary to pursue this case. And the reason why these arguments didn't draw an objection is because a jury has a right to consider such circumstances in its consideration of the "injury, damage and harm" that has been caused by defendants' conduct. And part of that "injury, damage and harm" was the fact that plaintiffs had to fight Appellant in court to get their money back.

Another example supporting respondent's position consideration of the prejudgment interest. The Court of Appeal properly considered the prejudgment interest awarded. Why? Because the damages caused by the defendants' wrongs caused the plaintiffs to lose the use of the funds that they were otherwise entitled to. In this case the defendants' torts caused damage in the amount of $126,665.59. But that drew interest at the rate of 10 percent. So at the time of the trial the interest had grown to $38,862.04. But that interest was caused by defendants depriving plaintiffs of the use of the money that had. been stolen from them. That caused harm. Here, to obtain the return of what was taken from them, plaintiffs spent over $447,000.00 in attorneys' fees and costs. Just as the interest is what plaintiffs lost on their money that defendants took here, the attorneys' fees and costs are additional harm and damages that they suffered in order to obtain judicial redress against defendants. If the Court is to consider interest to be actual damages, then it would be inconsistent not to consider the attorney fees and costs that were necessary to obtain the judgment awarding plaintiffs the damages defendants have caused them.

It is appropriate that this Court determine for the benefit of future litigants and the bench whether the harm plaintiffs sustained in pursuing their lawsuit against the defendants is appropriate to be considered for purposes of determining the permissible ratio between punitive damages and harm.

C. THE SAME MARKUP SCHEME WAS PERPETRATED UPON PLAINTIFFS AND HUNDREDS OF OTHER PARTNERS WHICH SHOULD HAVE BEEN CONSIDERED IN THE POTENTIAL DAMAGES/PUNITIVE DAMAGE CALCULUS.

The Court of Appeals stated: "Furthermore, to include speculative damages suffered by other potential plaintiffs in the calculus would run directly contrary to the Supreme Court's admonition in *Campbell* that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." (Opinion, p. 32.) This court's quotation from *Campbell* was preceded in *Campbell* by the statement: "The courts awarded punitive damages to punish and deter conduct that bore no relation to the *Campbells'* harm. A defendant's **dissimilar acts, independent from the acts upon which liability is premised**, may not serve as the basis for punitive damages. (*Campbell, supra,* 538 U.S. at 422.) The *Campbell* opinion goes on to state: "Although evidence of other acts **need not be identical to have relevance in the calculation of punitive damages**, the Utah court erred here because evidence pertaining to claims that had nothing to do with the third party lawsuit was introduced at length" (*Campbell, supra,* 538 U.S. at 423, 424).

Here, evidence was introduced of a massive markup scheme involving hundreds of other partnerships by the same convoluted invoice scam (pp. 4-7, *supra*). Plaintiffs respectfully submit that the evidence introduced here with regard to the markups affecting plaintiffs are the same

identical frauds and concealments that were committed upon hundreds of other partners (pp. 4-7, *supra*).

Admittedly, plaintiffs cannot quantify the damages to other partners, nor are they required to. Under the express language of *Gore,* one looks to the potential damage; (*Gore, supra,* 517 U.S. at 582). Under the express language of *TXO*, "[i]t is appropriate to consider the **potential** harm that the defendants' conduct would have caused to its intended victim if the wrongful plan had succeeded as well as the **possible** harm to other victims that might have resulted if similar future behavior were not deterred." (*TXO*, *supra,* 509 U.S. at 460.)

The potential harm to others as described in *TXO* and *Gore* were not proven with any greater specificity or proof of actual damages than have been proven here. Here, on the other hand, the amount of markups can be specifically determined by reference to Exhibit 287 and the operating expenses are set forth in the financial statements (see pp. 4-7, *supra,* Ex. 345, pp. 906-927.)

Under the analysis of *Campbell, TXO* and *Gore*, the markup scheme must be part and parcel of the punitive damage calculus in determining the appropriate amount to award against appellants on the basis that "*possible* harm to other victims might have resulted if similar future behavior were not deterred." (*TXO, supra*, 509 U.S. at 460; Brief p. 50.) That was the purpose for the jury's resounding award: To stop defendants from ever again cheating their fiduciary partners.

It is respectfully submitted that the potential damages caused to other partners is a significant feature of this case that this Court needs to consider in determining the constitutionally permissible limit on the punitive damage award here.

IV. CONCLUSION

This court is poised to clarify the law in California regarding this most controversial topic of the constitutionally permissible limit of a punitive damage award. The three cases the Court has before it will not allow this Court to fully explore and resolve issues that will arise in the future on this topic. By granting review here this court has the opportunity to consider the issue when it involves a fiduciary, intentionally breaching his fiduciary duties to his partners with actual malice and with the additional circumstances of attempting to obstruct justice, showing no remorse and refusing to acknowledge that he has done anything wrong. In addition, this Court has the opportunity in this case to consider how the public policy goals of deterrence and punishment can be accomplished by a single digit ratio when the wealth of the fiduciary is a staggering $600 million to $800 million. These issues need to be addressed if the Court is to make a comprehensive clarification of the law on this critically important, and extensively litigated issue.

Furthermore, this case poses a critically important issue regarding what damages are to be considered in the determining the permissible limit of an award of punitive damages. The Court has granted review in *Simon, supra,* which requires this Court to consider whether damages which the jury was not allowed to award should be considered in determining the permissible limit on a punitive damage award. Here, the attorneys' fees and costs incurred by plaintiffs were necessitated by the defendants' refusal to pay plaintiffs what they owed them. This poses an issue which will undoubtedly recur in the future and must be resolved. Any comprehensive evaluation of this entire topic must take into account whether the full amount of the judgment obtained, whether awarded by the jury or in part by the jury and in part by the court, are damages for the purposes of considering the constitutionally permissible limit of punitive damage award.

It is respectfully submitted that this case presents an ideal case for his court to grant review to consider all of these important issues.

Dated: July 6th, 2004. Respectfully submitted,
FREIDBERG & PARKER

By: /s/ Edward Freidberg
EDWARD FREIDBERG

BRIEF FORMAT CERTIFICATION PURSUANT TO CRC RULE 28.1(e)(1)

Pursuant to California Rules of Court Rule 28.1(e)(1), I certify that the Petition for Review is proportionately spaced, has a typeface of 13 points or more, and contains 8,176 words, including footnotes.

Dated: July 6, 2004. FREIDBERG & PARKER

By: /s/ Edward Freidberg
EDWARD FREIDBERG
650 University Avenue, Suite 205
Sacramento, California 95825

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

– – – oOo – – –

CHRISTO BARDIS, an individual, and LLOYD and NANCY ARNOLD, a California limited partnership, Respondent, vs. MARVIN L. OATES, an individual, general partner and co-tenant, A & A PROPERTIES, a California corporation, BUZZ OATES ENTERPRISES, II, a California corporation, Appellant.	)	Number. 01AS03250

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REPORTERS' TRANSCRIPT ON APPEAL

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APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF SACRAMENTO
HONORABLE LLOYD A. PHILLIPS, JR.,
ASSIGNED JUDGE

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Burgundy B. Henrikson, CSR No. 11373
Michelle K. Madrid, CSR No. 11401

*   *   *

[140] I want to tell you a little bit about BOE II and Buzz Oates' business so you understand it. Buzz Oates operates what one might almost call a full-service development location. If you want to develop something you get full service if you want to work with Buzz.

Now, there has been in excess of four hundred partnerships which have paid this five percent to BOE II, Buzz Oates Enterprises, the construction company. I'm going to get into it in more detail, I'm just trying to give you a few little facts in the limited time I have today. The amount of money that BOE II realized from the five percent represents point 00016 of his operating income.

BOE II was never set up, the evidence will show, to make money. Now, that may seem kind of silly to you. I mean, how can you set up a company, how can you operate it to not make money? Well, it's quite simple if you think about it.

BOE II is the enterprise whose function it is to make sure that the construction is done right, to get the contractors in there, to bring the project to fruition; whether it's taking a piece of dirt and subdividing it, overseeing that or he is taking a piece of dirt and putting a building on it, overseeing that. There's all kinds of variations.

The point is that the least amount of money that can be spent is to be spent in this approach on getting the project done. What does that do? That results in the cost to the partnership who is developing it, and it is whoever it might [141] be, in its ultimate product being much lower. Instead of spending full price for a contracting company to oversee, to get your work done, to make sure everyone shows up, you're paying a bargain rate. So your costs going in to the project is reduced. Very simple. Instead of spending $100,000 you spend 70,000. That's $30,000 less but that property is still worth what it would be otherwise.

What's that mean to the partnership or whomever it is that owns that property? ROE II has provided them value and has provided them value that they will ultimately realize with a capital gains tax rate as opposed to a full tax rate.

BOE II, the evidence will show, was a money loser. It was intentionally a money loser. It was intentionally a money loser in order to bring value to an ultimate project for the partners that are involved in the business. Now, that is something that happened hundreds and hundreds of times.

Now, you know, it's interesting, Mr. Freidberg showed you a chart of – and a time line. One of the things was, I believe it said, Arnold and Bardis bring the deal to Oates. Well, let's talk a little bit about the background of how my client got involved in this deal. Mr. Freidberg was quite accurate and quite candid and it's all well known that both Mr. Bardis and Mr. Arnold have a long history – a long interest in horse racing.

Mr. Bardis and Mr. Arnold in the mid '80s and in the latter part of the '80s made some attempts to get involved, with the purchase and get some control over the racetrack,

* * *

[175] There is going to be a lot of evidence, a lot of discussion of manipulation of commission. There is going to be a lot of discussion of cross-outs of documents. Well, the evidence will also show just as a general proposition that in at least the business that Mr. Oates is in, the real estate

business, people send an offer, you get the offer, you make a little change on it, you send it back or maybe you type it up again. That's no more than that. There is nothing mysterious. There is nothing sinister about it. You simply mark things up as you get to a deal. Now, I'm not suggesting that the markup isn't an indication of a thought process but in and of itself the markup means nothing.

Now, we talked yesterday a bit about philosophy, and I spoke to you that the evidence will show that the philosophy of BOE II was not to have high costs to develop a project. Keep the cost down so when you buy it, when you are into it, when a partnership takes it, it has a low base, good value, good capital gains return.

Not everybody pays capital gains tax but in the real estate business there is a lot of capital gains taxes being paid. Every partnership or every account that I discussed yesterday has to deal with real property; either a building, warehouse, or even just the infrastructure development. Every one of those entities, every one of those individuals, every one of those joint ventures makes its money from a low cost in, capital gain on the interest. So it isn't rocket science. It isn't a unique creation but it is a philosophy, and the philosophy was that BOE II was never, ever set up to [176] make money.

Now, it wasn't set up for the purpose of losing a lot of money. Thus, overhead, the cost of just doing it for people has been a traditional charge. It is also true that if a project were being done for Mr. Oates and his kids, BOE II didn't charge a markup but in every project or every account where there is a five percent markup Mr. Oates owned part of that twenty-five percent, fifty, some even one hundred percent. He was paying.

Now, again, back to the in-source/out-source thing that I briefly discussed with you yesterday indicating the services that BOE II provided. Mr. Johnson certainly will address that since he represents A&A, and I don't want to take his thunder on this. I am not suggesting that any way that it was inappropriate for Mr. Bardis to out-source, to use outside accountants, to use outside lawyers, to use outside engineers, but recognize for one second the amount of damage that Mr. Bardis and Mr. Arnold claim from the five percent, $13,000. Yesterday I mention that during the time that my client became general managing partner one of the things that was done was A&A Properties did accounting for nothing.

On September 12th, 1990 – that's not an important date but on September 12th, 1990, Cypress Development paid to Moore, Hamric and Snyder $13,025 for accounting. Fair price but over four years – over four years, $13,000, part of a five percent was run up and over four years was run up, the evidence will show, on accounting.

* * *

[247] A. Yes.

Q. Okay. And the other parcels then had been split up among the partners?

A. Yes.

Q. Now, were you present at the meeting that we have had reference to here? And you have been in the audience since the start of this trial, right?

A. Yes.

Q. Described as either the blowup meeting or storming out meeting, but you were present at the meeting in which there was a verbal altercation between Mr. Bardis and Mr. Oates?

A. Yes.

Q. Okay. So can you tell us when that was?

A. I don't know. I believe it was late '97, early '98, somewhere in that period.

Q. Okay. And who was present at the meeting?

A. I just remember Mr. Bardis, Mr. Oates, my father, Jack Spiegelman from A&A, Larry Allbaugh, and I believe Bruce Kemp was also there.

Q. And do you recall the topic that caused the blowup?

A. I don't specifically recall the topic, no,

Q. Well, do you recall it generally?

A. No. I would be speculating.

Q. Okay. But there was apparently World War III that went on there?

A. It wasn't pretty.

Q. Okay. Now. I'm not asking you for descriptive words of what was said, but can we say that there was profanity [248] uttered by both sides?

A. Yes.

Q. By Mr. Bardis and by Mr. Oates?

A. I believe so, yes.

Q. And is it fair to say that voices were raised significantly?

A. Yes.

Q. Yelling occurred?

A. Yes.

Q. Okay. And, many derogative phrases were tossed back and forth between the participants, Mr. Oates and Mr. Bardis?

A. Yes.

Q. Okay. And then this meeting took place where?

A. In the Buzz Oates Enterprises conference room.

Q. Okay. And did Mr. Oates storm out?

A. Yes.

Q. And to your knowledge, has he ever spoken to Mr. Bardis again?

A. Not that I'm aware of.

Q. Okay. Since that time you would communicate with and talk with Mr. Oates over the next few years, wouldn't you?

A. Me?

Q. Yeah.

A. Yes.

Q. You would talk to him virtually on a daily basis, right?

A. Yes.

Q. There is just dozens of real estate transactions that

* * *

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* * *

[769] A. I believe that's correct.

Q. And that stands for Buzz Oates Enterprises II?

A. Yes.

Q. Okay. And you're the managing partner of that partnership?

A. When?

Q. Before 1999?

A. No, not necessarily. I have a managing partner – I have a managing, yeah, partner who has nine percent interest that managed that department before 1999.

Q. When you say a "nine percent interest", you are talking about a nine percent percentage of the profits, the operating profits, aren't you?

A. No, I'm not.

Q. Okay. He owns nine percent of the equity?

A. Yes.

Q. Okay. So you own ninety-one percent of the equity?

A. No.

Q. How much do you own of the equity?

A. Ten percent.

Q. Ten percent. Who owns the other eighty percent or eighty-one percent?

A. Well, the five managers and the people that make the decisions which is Kevin Ramos, Jack Spiegelman, Larry Allbaugh and Mike Stoddard.

Q. Now, you heard the opening statement and your attorney said that BOE II wasn't set up to make a profit –

A. That's correct.

[770] Q. – right? Okay.

So you gave these people ninety percent interest in the company and you took ten percent, right?

A. That's correct.

A. But it wasn't designed to make a profit. It was designed to service interest in properties that you owned an interest in?

A. But the real estate company – they didn't – they don't – they – they didn't get their profit out of or they shouldn't get their profit out of the – out of the construction side of the company which is BOE. They should get their profit out of the real estate side where they charge me commissions, and they do the management of my property on a percentage basis.

That's where the – that's where the – I'm not saying they don't make any profit in BOE II, but BOE II was never set up as a profit organization. It was – it was set up for the purpose of producing investment property as cheap and with as little expense as it can. We would be happy if we broke even.

Q. Okay. When you say "producing", BOE II services and manages investment properties that you own an interest in, right?

A. Not very many of it is over A&A Properties.

Q. Well, listen, this is becoming confusing.

A. In another corporation by the way.

Q. A&A Properties and BOE II are two separate organizations?

* * *

[778] else. It wasn't subdivided for the other people, it was subdivided for ourselves. There could be some sales to an office or shopping center or commercial or warehouses in the subdivision that we created.

Q. Okay. Okay. And these things that are done under Buzz Oates Enterprises II, they are intended to make a profit, aren't they?

A. Buzz Oates Enterprises II is set up basically as a service not to make a profit. We try to break even on Buzz Oates II. Sometimes we make a little profit, sometimes we don't. It was never set up as a profit organization. It was set up basically to create investments for myself.

We certainly don't want to – that's straight income tax – that money that is made in Buzz Oates Enterprises II, that's straight income tax. We try to get the building built as cheap and as inexpensive as we possibly can. Then we move it over to the investment side of it. At that point the money we save there doesn't become straight income tax, it becomes long term capital gain.

Also, when you sell it you very often don't pay any income tax because you can make a 1031 tax-free exchange. So we don't want to pay forty-six percent income tax on the money that's made at Buzz Oates Enterprises II. That's a little complicated I understand, but that's basically the philosophy in the back of this company.

Q. Okay. But then the title of the ownership of the properties that are developed through Buzz Oates Enterprises is then taken in your name?

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* * *

[979] A That's correct.

Q Okay. But he had different reasons that he told you?

A Yes. That's correct.

Q Did he – when you started working there and became a partner, did he explain to you what he hoped to accomplish by charging these markups on invoices?

A Yeah. To help pay overhead and hopefully make a profit.

Q Okay. Did he indicate to you that he considered the markups that he made – put on invoices to be a profit activity?

A Uh, yeah. That's a hard question to answer. When you say "a profit activity," and if you have cost plus five, I mean if you're billing your overhead and it's five percent, conceivably you have a five percent profit. So from that standpoint, yes.

Q Okay. Well, did he indicate to you that he intended to make a profit or did not intend to make a profit on the markup?

A No. The five percent markup was designed to cover the overhead associated with the organization.

Q Okay. And then what was the ten percent? Did he indicate to you why he was charging ten percent then?

A Same thing. Same reason.

Q Okay. Now, BOE II is where the markup was taken?

A Uh, yes.

Q And so BOE II had partnerships that he managed?

A Yes.

Q For which these markups were placed on, right?

A Yes, That's correct.

[980] Q Did he also have income from other sources other than projects that he managed?

MR. BRENNER: Excuse me. To BOE?

MR. FREIDBERG: BOE II.

THE WITNESS: BOE II?

Q (By MR. FREIDBERG) Yes.

A We would make a – Buzz would make a – BOE II actually I guess made a profit on interest that was charged to projects.

Q So if projects borrowed money he would loan the money and charge interest?

A That's correct.

Q Okay. And that was a profit center?

A Uh, yes.

Q And then he would – would there be projects that were owned by BOE II that were being operated out of BOE II?

A I believe there were, yes.

Q And was this intended to make a profit also?

A Uh, again, define "profit." I mean everything we got into we intended on making a profit. So I'm confused by the question. Sorry.

Q Okay. Well, with regard to the overhead, in the years that you were there did the – did the monies that were charged in markups pay the entire operating expenses of BOE II?

A Yes, they did.

Q Did they produce additional revenues?

A I don't remember exactly, but I believe they did, yes.

Q I mean I don't need to know the exact figures, but what was the approximate figures that BOE II made in excess of their [981] operating expenses?

A At this point I couldn't even give you a number. I don't recall. Its been a long, long time.

Q I understand that. But were they making a profit on BOE II?

A You know, I think so, yes. I believe we were, yeah.

Q Okay. Did Mr. Oates have a practice of billing like a hundred percent of what project managers billed him?

A. Uh, I don't follow the question.

Q Did Mr. Oates have a practice of billing the partnerships twice as much as he was actually paying project managers?

A Are you asking if the hourly rate was 20 bucks an hour, did he bill 40 bucks an hour?

Q Yeah.

A We did have a practice of doing that, yes.

Q Okay. And was Mr. Kemp one of the project managers?

A Yeah, I believe he was.

Q Was there other project managers?

A Hmm, I think we had other project managers, but I believe the other project managers were on salary and they were billed accordingly.

Q Now, was the projects that these project managers were on salary, were they – were the partnerships that they performed services for billed for their time?

A Yes, they were.

Q Okay. So if they were employees they were billed for the time to the partnership, correct?

A Yes.

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[1251] MR. BRENNER: I need a Teddy bear.

What am I reading? I'm sorry. Just the yellow ?

MR. BRENNER: This, your Honor, starts at page 86, 4 – excuse me. 87, 4 through 88, 6.

MR. FREIDBERG: Five.

MR. BRENNER: I can do this all by myself.

(Deposition read.)

MR. BRENNER: And now, your Honor – I'm not doing this ?

MR. FREIDBERG: No. Lines 13 through 15.

MR. BRENNER: Thank you.

Lines 13 through 15 on page 88.

MR. JOHNSON: I believe 13 and 14 is what was designated.

MR. BRENNER: Yes. But the yellow went to – went on to 15, but we're not going to do 15.

(Deposition read.)

MR. FREIDBERG: That completes the deposition, your Honor.

Mr. Goodmanson, you may step down and go back to Anaheim.

THE COURT: Mr. Oates?

MR. FREIDBERG: Mr. Oates for the last time.

Mr. Oates come around here for me.

THE COURT: Come on up, Mr. Oates.

MR. FREIDBERG: Have a seat, Mr. Oates.

THE COURT: Good morning.

CROSS-EXAMINATION

BY EDWARD FREIDBERG, Attorney at Law, Counsel on behalf of the Plaintiffs:

* * *

[1311] exactly what they said.

Q Okay. At some point in time you became hostile to Chris Bardis, right?

A That's correct.

Q And it was at that point in time you ran – left the meeting and were screaming –

A I left the meeting. I have high blood pressure and I don't want to take a lot of that kind of stuff, and so I left the meeting. And from then on I don't think I said five words to Mr. Bardis.

Q Okay. And from that time you were very – you had very derogatory thoughts about Chris Bardis, right?

A Yes.

Q. Okay. And in your own mind you had developed an expression that you used to describe him, right?

A What do you mean by that?

Q Did you come up with an expression to use to describe what you thought of Chris Bardis?

A I don't know that I came up with an expression.

Q Well, what did you tell people what you thought of Chris Bardis?

A I admit that I called him a Greek, just like the pastor did at the church that said, "The little Greek." I admit that I used the word "Greek. You can't trust him."

Q Okay. Well, you told people you couldn't trust him.

A That's right.

Q Okay. You told people he was "a damn Greek," right?

A I don't know about the "damn" part.

[1312] Q Okay. Did you call him the biggest asshole in Sacramento?

A Yes.

Q Okay. And on many occasions.

A Yes.

Q And even when he was present.

A And – pardon me?

Q Even when he was present.

A Who was present?

Q Chris Bardis.

A I wouldn't say it to anybody else other than to him face-to-face.

Q Well, didn't you say it to him at Maces Restaurant when he was walking by your table when he had his niece present and his nephew present?

A I don't know who was present, but I did say that to him.

Q Okay. And you had some people at the table and you were laughing about it, right ?

A I don't know whether I was laughing or not.

Q And do you recall saying the same thing about him when you were having your pedicure – a manicure at L.A. Women Nails? L A Women's Nails?

A I don't recall it.

Q Don't you recall talking to a young lady who was having her nails done and you found out who she was working for, and she told you she worked for Reynen and Bardis and you called him the biggest asshole in Sacramento?

A I don't know that I used that expression. I know I used

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[1844] improve partnership property and that partnership property was subsequently sold as a partner, would you have wanted and felt that Mr. Bardis was entitled to be reimbursed from that sale of property?

A. Yes. Absolutely.

MR. BRENNER: That is all I have.

THE COURT: Ma'am?

MS. SAN PEDRO: No questions, your Honor.

THE COURT: Anything else?

MR. FREIDBERG: Yes.

THE COURT: Okay.

REDIRECT EXAMINATION

BY EDWARD FREIDBERG, Attorney at Law, Counsel on behalf of the Plaintiffs:

Q. Mr. Manz, let's start where Mr. Brenner left off.

If a partner spends money for the benefit of the partnership with the consent of the partners he is entitled to have a payable on the books of the partnership if they owe him money?

A. That would be reasonable, yes.

Q. And that has to be agreed to by the partners?

A. Yes.

Q. Because a partner just can't make improvements for what he conceives to be the benefit of the partnership without the partners agreeing to those improvements?

A. That would be right.

Q. Just like a partner can't, without the authority of the partnership, go out and spend money unless he has the

* * *

[1913] your brother write the letter because you were upset?

A. I thought it was time to look at the books quite frankly. And what probably precipitated this more is they were complaining to me about a transaction that was done down there for the benefit of the partnership. They made a big deal over it and it just – it just infuriated me that I had gone through what I had gone through for all of these years and I was dealing at that level, and I just didn't want to handle it.

Q. Okay. So you wanted to now see what they are doing?

A. It wasn't that. I just felt that – you know, I knew there were charges that didn't look appropriate and I wanted to see them.

Q. Okay. Now, there has been discussion – by the way, in the correspondence you made demands repeatedly to return all charges that were in excess of the invoices?

A. Yes.

Q. Was that ever returned to the partnership?

A. No, it was not.

Q. And as a consequence of that and the commission issued, did you file this lawsuit?

A. Yes.

Q. Okay. Now, at some point in time – we have had reference to a blowup meeting in which Mr. Oates walked out of a meeting in his own office?

A. Yes.

Q. Were you present in that meeting?

A. Yes.

[1914] Q. Can you tell us approximately when that meeting took place?

A. I – I believe it was in 1997, September or October, somewhere in that period. I know it was before the tenancy-in-common agreement or I feel that that's the case.

Q. Well, the tenancy-in-common agreement, I will show you, is on – it's Exhibit 4.

A. I'll be happy with a date.

Q. No. It's dated September 30th, 1997. Can you see Exhibit 4?

A. Okay.

Q. And it is signed – dated September 25th for every signature except yours ?

A. Yes.

Q. So you think it was before this meeting or this document was signed?

A. I believe so, yes.

Q. Okay. So can you tell us then what precipitated this confrontation or dispute?

A. We were talking about breaking up the property and Mr. Oates wanted some cross collateralization on a lot of Mr. Arnold's assets and also – which would effect me, and I just didn't think it was appropriate because he was adequately collateralized on the project in what we were doing.

Q. You know, this cross-collateralization, you are going to have to explain that to us. Okay.

When you broke up the property you are talking about collateral on the remaining monies that are owed on the note?

* * *

[1917] Q. Okay. So he wanted – he wanted a deed of trust of – that you and Mr. Arnold would sign for parcels 7, 8 and 9?

A. That's right.

Q. Okay. Plus he wanted additional collateral for additional partnerships that Mr. Arnold owned with him?

A. He wanted to use this as collateral on additional parcels and to me it was inappropriate and reaching too far, and I got upset.

Q. Okay. So he wanted to use this property then as collateral for other loans that Mr. Arnold had with him?

A. Right. My understanding is those were adequately collateralized and weren't a problem. But there was no reason to drag me into those other loans. There was no reason to cross-collateralize this plot property. The property had sufficient assets within itself. We had a bank loan and cross-collateralization just did not fit in the equation. It was wrong and I told him.

Q. Okay. And did the conversation get heated?

A. It got heated because I was – I was – it didn't get heated that bad. I was just upset that someone would do that.

Q. Okay. Was there voices elevated?

A. Uh, a little bit but a little worse than what I just expressed here.

Q. Okay. Well, you can be –

A. I'm getting a little emotional thinking about it.

Q. Okay. But the thing is, did you guys yell and scream at each other?

[1918] A. I don't think it got to that level. He stomped out of the room yelling and life went on.

Q. I know, but did you guys yell at each other and scream?

A. I don't think it was – I – I don't think it got to the level. I have heard testimony of that. I did tell him what I thought, I thought it was wrong. I just don't think it is the right thing to do, and he didn't like it. So that was the end of it.

Q. Have you ever spoken to him since?

A. No, I haven't.

Q. Has he spoken to you since?

A. No, he hasn't.

MR. FREIDBERG: Your Honor, this might be a good time to break since I'm going to start on a slightly different topic.

THE COURT: All right.

MR. BRENNER: And that it is four o'clock.

MR. FREIDBERG: That had a lot to do with it.

THE COURT: We are in recess, ladies and gentlemen. Reconvene tomorrow morning at 9:30. Have a nice evening.

(Evening recess.)

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[2702] See there, 8:30 tomorrow morning. See how it goes. Mr. Freidberg?

MR. FREIDBERG: We would like to call Rachel Bardis.

Rachel, would you step forward, please, and be sworn.

COURT ATTENDANT: Please raise your right hand.

Do you solemnly swear that the testimony you are about to give in the cause now pending before this Court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: Yes.

COURT ATTENDANT: Please take your seat.

Please state your full name and spell your last for the record.

THE WITNESS: Rachel Catherine Bardis, B-a-r-d-i-s.

TESTIMONY OF

RACHEL CATHERINE BARDIS, witness called on behalf of the Plaintiffs:

DIRECT EXAMINATION

By EDWARD FREIDBERG, Attorney at Law, counsel on behalf of the Plaintiffs:

Q. Rachel, what is your occupation?

A. Homebuilder and land developer, but mainly homebuilder.

Q. Okay. And who do you work for?

A. Reynen and Bardis, but also myself.

Q. Okay. Rachel, are you related to Chris Bardis?

A. Yep. He is my uncle.

Q. He is your uncle. And your father is whom?

A. Elias Bardis.

[2703] Q. And he goes by the name of Lou?

A. Right.

Q. And he is an attorney?

A. Yes.

Q. Okay. Now Rachel, were you present at a salon called L A Woman Nails –

A. Yes.

Q. – in Sacramento when Mr. Buzz Oates was there?

A. Yes.

Q. Okay. And how do you know who Mr. Oates is? Have you seen him before?

A. Yep.

Q. Okay. Now, at that salon, were you having a pedicure?

A. Manicure and pedicure, yeah.

Q. And where were you in relationship to Mr. Oates?

A. Sitting next to him, having a pedicure.

Q. Okay. Now, then did you have your manicure at some other more distant location?

A. Yeah. There is a different station for manicures.

Q. Now, did a young lady who also works for the company that you work for, was she also present there?

A. Yeah.

Q. And was there a conversation between Mr. Oates and the young lady?

A. Yes.

Q. And did the conversation involve your uncle?

A. Yes.

Q. Okay, And so did Mr. Oates make any comment with [2704] regard to your uncle?

A. Yes.

Q And what did he say?

A. Uh, crooked bastard – crooked as hell.

Q. And how did the conversation come up?

A. Uh, she noticed he was getting a pedicure, and was being cute and said, aren't you going to get a nail color? And he said, do you know who I am? She said no, but I think she does, and pointed over to me. And – and I said, I'm Chris Bardis' niece, and yeah, I recognize you as

Buzz Oates. And he said, oh, that crooked asshole, and paid and turned around and walked out.

Q. Was that loud enough for everyone to hear it?

A. Yeah. It was embarrassing.

Q. To you?

A. It was – it was offensive because that is my uncle, my godfather.

Q. Okay. Now, was there another occasion that you were in the presence of Mr. Oates in which he made any derogatory comment about your uncle?

A. Yes.

Q. And where did that take place?

A. At the bar at Mace's.

Q. And how did you happen to be there?

A. I was going to look at furniture at – um, office space right next to Mace's, and, um, meeting with a broker from the office space and my partner and, um, a guy that connected us up with the person who was going to show us the furniture. [2705] And we were waiting for my uncle to show up. And when he did, he walked through the bar. And we were walking out, and Buzz was sitting with a group of people in the middle of the bar. And at that time it was after work, so there were people there. And he said, oh, there goes the biggest asshole in Sacramento.

Q. And did he say that in a normal conversational tone of voice?

A. Loud enough so that all of us could hear it loud and clear. And there is no question that it was loud enough in the restaurant, in the bar area, that more people could hear.

MR. FREIDBERG: Okay. All right, Rachel. Thank you very much.

MR. BRENNER: Thank you, your Honor.

CROSS-EXAMINATION

By EDWARD BRENNER, Attorney at Law, Counsel on behalf of Defendants Marvin L. Oates and BOE II Enterprises:

Q. Good afternoon, Ms. Bardis.

A. Hi.

Q. The conversation that you had with Mr. Oates concerning his pedicure, manicure, when was that?

A. That was after the Mace's event. It was – I don't recall the exact day. It was probably about two to three weeks after.

Q. Two or three weeks after the Mace's event?

A. Mace's, when we were there.

Q. Which is the second thing you spoke about?

A. Yes.

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Pages 3601 through 3808

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[3652] At this time, ladies and gentlemen, there are some technical matters I need to take up with Counsel so I'm going to let you take a fifteen or twenty minute recess.

(The following proceedings were then had in open court outside the presence of the jury.)

THE COURT: All right. Gentlemen, in light of that verdict it brings up the next phase of the proceedings, and I wondered what your pleasure is in that regard.

MR. FREIDBERG: Could I suggest – make my suggestion from my standpoint?

THE COURT: Yes.

MR. FREIDBERG: I request that the Court order them to produce the financial records which we have sent interrogatory questions, we have subpoenaed them, you know, and the Court has the authority to require them to produce it that they produce them no later than 1:30 this afternoon in my office. I will be prepared to try the mini trial tomorrow morning starting at 8:30. I anticipate my case will last maybe an hour and a half of testimony. And I suggest we proceed forthwith because we have all day tomorrow.

THE COURT: We will take care of –

MR. FREIDBERG: Sure.

THE COURT: What is your position, either side? Could you – is there any possibility that there could be some sort of a stipulation with respect to finances in this matter rather than get involved with a bunch of records and so forth?

MR. FREIDBERG: I have to see the financial records [3653] before I can stipulate to anything, Judge. See, as you know we haven't got any discovery and that is appropriate but now is the time I have got to see the financial records and then I would be most willing to discuss stipulating to the financial amounts to save time.

THE COURT: All right.

MR. FREIDBERG: But I mean I can't do it in the abstract.

THE COURT: All right. Okay. What were you going to say, Mr. Brenner?

MR. BRENNER: Well, I'm still trying to get over the verdict so if you give me a moment. Your Honor, what I was going to say was I was assuming we would not be doing it tomorrow but you know –

THE COURT: I would really like to proceed. I really would. I would like to proceed today as a matter of fact.

MR. FREIDBERG: I have to have the finances.

MR. BRENNER: All right. We will proceed to get some documents to Mr. Freidberg, though I'm not certain exactly what we have, but we will have enough for you to know.

MR. FREIDBERG: No. I have – we are entitled to actual financial records.

MR. BRENNER: I understand.

MR. FREIDBERG: They say they have financial statements of Mr. Oates and A&A Properties.

THE COURT: Okay.

MR. BRENNER: We have no problem with that.

MR. FREIDBERG: We have subpoenaed them.

[3654] THE COURT: Okay.

MR. BRENNER: They will be available.

MR. FREIDBERG: Not just records, I want those records.

MR. BRENNER: They will be available to you, Ed.

MR. FREIDBERG: Okay. I need them no later than 1:30 because I have to prepare, and I'm ready to go.

THE COURT: How about you, Counsel, Mr. Johnson?

MR. JOHNSON: I'm assuming that A&A can pull together its financial records. I don't know what parameters –

THE COURT: It should have been done a long time ago. In other words, the preparation should have been made –

MR. JOHNSON: Right. The issue, if any, is the parameters. At what point in time do you want to look at the net worth of either –

MR. FREIDBERG: Today. Now.

THE COURT: Today, the 31st of October.

MR. FREIDBERG: Oh, yes, but their records as of last year are acceptable.

MR. JOHNSON: Whatever the closest records are to today would be what your Honor wishes?

THE COURT: I would assume so, yes.

MR. JOHNSON: Then that – that puts a parameter on it.

THE COURT: Yes. Okay. So we adjourn until tomorrow morning at 8:30?

MR. JOHNSON: I think that's appropriate.

MR. FREIDBERG: That is fine.

THE COURT: We will all be prepared and we will conclude argument tomorrow.

* * *

[3794] concept of fairness. So that is Mr. Oates at a restaurant, you know, and he is going to have a million different reasons why he didn't do anything wrong and this jury didn't assess large punitive damages against them.

I want you to imagine another scene at that same restaurant that he hangs out at in which Mr. Oates is laughing and bragging about the fact, well, you know, this probably was pretty good because, you know, this makes me immune from lawsuits. You know, that guy Bardis and Arnold, they had the temerity to sue me. Well, I taught them a lesson. I put them through a two-month trial, I sued them on cross-complaints, I cost them an enormous amount of money and, you know, what they got, they got back just what the damages were that they claimed. You know, no one is going to try that again. No one is going to go against me because I'm Buzz Oates.

But ladies and gentlemen, you make decisions and the law supports you in every way that there was an intent to deceive, fraud, fraud by intentional misrepresentations, fraud by concealment, intentional breaches of the fiduciary duty. You have found, supported entirely by the evidence, that there was clear and convincing evidence of fraud, malice and/or oppression. Those are not mistakes, that is an intent to cheat.

Our society does not accept cheating as the name of the game. It does not tolerate it. It does not condone it. It puts people in jail for cheating and for a lot less than $165,000.

* * *

[LOGO]

January 16, 1998

Mr. Bruce Kemp
Project Manager
Buzz Oates Enterprises
8615 Elder Creek Road
Sacramento, CA 95828

Re: Offer To Purchase
6.0 Acres Vacant Land on Walker Street,
Adjacent to 6.2 Acre Nazarene Parcel at
the SWC of Cerritos and Walker
Cypress, California

Dear Mr. Kemp:

Pursuant to our conversation on Thursday, January 15th, Ewing Development is pleased to submit to you the following offer to purchase the above-referenced lot under the following terms and conditions:

1. BUYER:	Ewing Enterprises, a California Corporation, or Assignee.
2 PREMISES:	Approximately 6.0 acres consisting of a new parcel to be created as identified in Exhibit A.
3. PURCHASE PRICE:	Three Million One Hundred Thirty Six Thousand Three Hundred Twenty and No/100ths Dollars ($3,136,320.00 or $12.00 per square foot of net usable land area as defined as all land net of all public rights of way to be confirmed by a survey of a California licensed Civil Engineer. In addition, Seller shall provide all utilities to the subject parcel prior

to the close of Escrow. Buyer to assume assesment bonds not to exceed $70/SF.

4. **CONTINGENCY PERIOD:** Upon mutual execution of the purchase and sale agree-ment, Buyer shall have sixty (60) days from opening of escrow to complete their due diligence upon the premises.

5. **ESCROW PERIOD:** Escrow Shall close thirty (30) days after expiration of contingency period, or upon recordation of final parcel map whichever occurs later.

6. **ESCROW DEPOSIT:** Upon opening of escrow, Buyer shall deposit the sum of $25,000.00 into escrow which shall be refundable during the contingency period. After all contingencies have been approved on the sixtieth (60th) day from the open-ing of escrow, Buyer's depos-it shall be increased to $100,000.00 and said deposit shall become non-refundable but applicable to the purchase price.

7. **CONTINGENCY ITEMS:** The Buyer, at its sole discretion, shall approve the following during the contingency period, inter alia:

   a) Free and clear title to subject legal parcel;

   b) Zoning for Seller's development plan;

c) Site plan review and approval by Seller of City of Cypress's conditions for Development;

d) Soils tests;

e) Economic feasibility study;

f) Environmental assessment;

8. ESCROW AND TITLE: Escrow and Title will be held at First American Title Insurance Company. Buyer and Seller shall be responsible for their respective fees.

9. TITLE POLICY: Seller, at Seller's sole cost and expense, shall provide Buyer with a CLTA title insurance policy from First American Title Insurance Company.

10. ENVIRONMENTAL REPORTS: Seller, at Seller's sole cost and expense, shall provide Buyer with a current Phase I environmental study for the subject premises.

11. BROKERAGE: Seller shall be solely responsible for the payment of any real estate sales commissions involved in this transaction. Buzz Oates Real Estate is to recieve a 4% commission.

12. EXPIRATION: This proposal shall expire at 5:00 p.m. Monday, January 26, 1998.

This letter represents a non-binding proposal to purchase, and no party shall have the right to ensure any legal actions with respect to the transaction described herein. Any understanding between the parties shall only be deemed to have been reached when purchase documents acceptable to their respective counsel containing all the applicable terms and conditions relating to the transaction have been executed by both parties and documents have been delivered to Buyer and Seller.

I have enclosed herewith a description of Ewing Development which includes a brief personal resume, a list of completed and current projects, and a list of references. Should you care to confirm my financial ability to close this transaction, please feel free to call John Houton at California State Bank (714 851-9900) and Greg Nakahira at Heller Financial (310 470-6377).

I hope the general terms are acceptable to you and I look forward to your favorable response.

Sincerely,

EWING DEVELOPMENT COMPANY

Thomas G. Ewing

cc:

BUYER: EWING ENTERPRISES OR ASSIGNEE	SELLER: BUZZ OATES ENTERPRISES, A CALIFORNIA CORPORATION
By /s/ ____________	By /s/ ____________
Title President	Title ____________
Date: 1-16-98	Date: ____________

[LOGO]

First American Title Insurance Company

114 EAST FIFTH STREET, (P.O. BOX 257) SANTA ANA, CALIFORNIA 82701 (714) 558-3211 FAX (714) 547-2235

SELLER'S CLOSING STATEMENT

ESCROW STATEMENT OF:
MARVIN L. OATES FRANK C. RAMOS
OBF, & CALIF, GENERAL PARTNER
LLOYD AND NANCY ARNOLD LP
CHRISTO D. BARDIS
Purchaser: EWING DEVELOPMENT, A CALIFORNIA CORP.
Property Address: 10,205 ACRES – WALKER AVENUE
CYPRESS, CA

Escrow: 9846412M
Escrow Officer: Judith M. Moore
Date: July 01, 1988
Closing Date: 07/01/98
Estimated

TOTAL CONSIDERATION			5,087,111.00
REIMBURSEMENTS/CREDITS			
TOTAL CREDITS:			5,087,111.00
LESS: CHARGES AND DEDUCTIONS/DEBITS			
COMMISSION(S)			
LISTING BROKER: OB COMMERCIAL			
COMMISSION		203,484.44	
TITLE CHARGES TO FIRST AMERICAN TITLE INSURANCE COMPANY			
TRANSFER TAX		5,596.25	
ESCROW CHARGES TO FIRST AMERICAN TITLE			
ESCROW FEE		2,508.75	
RECORDING FEES:			
RECORDING FEES		350.00	
LOAN PAYOFF TO: TOKAI BANK OF CALIFORNIA			
PRINCIPAL AMOUNT OF LOAN	3,400,000.00		
INTEREST FROM 06/01/98 TO 6/30/98	26,019.44		
PER DIEM @ 897.2200			
FROM 06/30/98 TO 07/03/98	2,691.66		
STATEMENT/DEMAND FEE	60.00		
COLLATERAL RELEASE	65.00		
FILING FEE	21.00		
FAX FEE	5.00		
TOTAL LOAN PAYOFF		3,428,862.10	
TOTAL DEBITS:			3,640,801.54
BALANCE DUE YOU			1,446,309.46

WE HAVE READ AND DO HEREBY
APPROVE THE FOLLOWING

BY /s/ ____________________
BY /s/ ____________________

WE HAVE READ AND DO HEREBY
APPROVE THE FOLLOWING

BY /s/ ____________________
BY ____________________

[LOGO]

First American Title Company

SELLER'S CLOSING STATEMENT

Final

Escrow Number:	9952612M	**Title Order Number:**	9952612
Escrow Officer:	Mickey Vandenberg	**Date:**	09/22/1999
		Closing Date:	09/21/1999

Escrow Statement Of:

Exchange Intermediary, Inc. as exchange intermediary for Oates, Ramos, OBF, Christo D. Bardis and Lloyd and Nancy Arnold Limited Partnership

Property: Katella & Walker, Cypress, CA

DESCRIPTION	DEBITS	CREDITS
TOTAL CONSIDERATION		7,720,258.00
PRORATIONS/ADJUSTMENTS:		
Property Tax @ 90,108.86 per 12 month(s) 7/01/1999 to 9/21/1999	20,024.19	
COMMISSION(S):		
Listing Broker: CB Commercial Real Estate Group, Inc.	154,405.16	
Selling Broker: Cushman & Wakefield	154,405.16	
TITLE CHARGES TO: First American Title Company		
Owner's Premium for 7,720,258.00	1,452.24	
County Transfer Tax	8,492.55	
ESCROW CHARGES TO: First American Title Company		
Escrow Fe	1,816.38	
Wire Fees	40.00	
Exchange Fees	400.00	
ADDITIONAL DISBURSEMENTS:		
Exchange Fees/Marvin Oates: Exchange Intermediary, Inc.	2,500.00	
Exchange Fees/Frank Ramos: Exchange Intermediary, Inc.	2,500.00	
Exchange Fees/OBF: Exchange Intermediary, Inc.	2,500.00	
Exchange Fee: Milton Kane, Attorney at Law	2,500.00	
Attorney Fee: Murphy, Austin, Adams, Schoenfeld, LLP	6,500.00	
Sales Proceeds: Exchange Intermediary, Inc. For Marvin L. Oates	1,380,510.44	
Sales Proceeds: Exchange Intermediary, Inc. For Frank C. Ramos	1,840,680.58	
Sales Proceeds: Exchange Intermediary, Inc. For OBF	460,170.14	
Sales Proceeds: Milton Kane, Attorney at Law/Christo D. Bardis	1,840,680.58	
Sales Proceeds: Lloyd and Nancy Arnold Limited Partnership	1,840,680.58	
TOTALS	7,720,258.00	7,720,258.00

Financial Statements

Marvin L. Oates

December 31, 2000 and 1999

David O. McReynolds
Certified Public Accountant
9700 Business Park Drive, Suite 304
Sacramento, CA 95827-1718

Mr. Marvin L. Oates
Sacramento, California

I have compiled the accompanying statements of financial condition of Marvin L. Oates as of December 31, 2000 and 1999, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants.

A compilation is limited to presenting in the form of financial statements information that is the representation of the individual whose financial statement is being presented. I have not audited or reviewed the accompanying statements of financial condition and, accordingly, do not express an opinion or any other form of assurance on them.

/s/ Illegible
Sacramento California
January 17, 2002

9. Investment in Partnerships (continued)

	Brandwein Building	Buzz Oates Enterprises II	Buzz Oates Enterprises Arizona	Buzz Oates Exchange, Inc.	California Skate Chico	California Skate Sacramento
Assets:						
Current assets	$39,590	$64,737,914	$261,082	$11,846	$87,869	$76,959
Noncurrent assets	554,333	73,647,379	15,717,518	0	313,879	361,325
	$593,923	$138,385,293	$15,978,600	$11,846	$401,748	$438,284
Liabilities & Equity:						
Current liabilities	$0	$55,836,698	$27,416	$1,894	$69,165	$20,634
Noncurrent liabilities	0	37,474,868	14,341,754	0	52,727	0
Equity	593,923	45,073,727	1,609,430	9,952	279,856	417,650
	$593,923	$138,385,293	$15,978,600	$11,846	$401,748	$438,284
Equity based on estimated value at December 31, 2000	$1,424,000	$155,538,000	$21,038,000	$10,000	$900,000	$1,564,000
Summary of Operating Results:						
Total Revenues	$290,491	$91,697,276	$2,867,948	$34,804	$758,287	$828,823
Operating expenses	27,343	71,840,419	1,285,019	33,564	554,616	559,052
Depreciation	63,478	2,256,356	125,028	0	38,998	37,898
Interest	0	7,105,044	416,799	0	10,455	0
Total Expenses:	90,821	81,201,819	1,826,846	33,564	604,069	596,950
Net Income	$199,670	$10,495,457	$1,041,102	$1,240	$154,218	$231,873
Summary of Marvin L. Oates' equity in net assets:						
Ownership Percentage	25.00%	75.00%	50.00%	75.00%	30.00%	22.50%
Investment in Partnerships	$356,000	$116,653,000	$10,519,000	$7,000	$270,000	$352,000

Financial Statements

Marvin L. Oates

December 31, 2001 and 2000

Marvin L. Oates
Statements of Financial Condition
December 31, 2001 and 2000

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9. Investment in Partnerships and Co-Tenancies (continued)

	Buzz Oates Construction	Buzz Oates Development LP	Buzz Oates Enterprises II	Buzz Oates Enterprises Arizona	California Skate Chico	California Skate Sacramento
Assets:						
Current assets	$ 36,195,461	$ 201,247	$ 62,790,152	$ 146,241	$ 56,219	$ 77,283
Noncurrent assets	629,360	210,193	73,909,655	21,787,615	281,572	323,290
	$ 36,824,821	$ 411,440	$ 136,699,807	$ 21,933,856	$ 337,791	$ 400,573
Liabilities & Equity:						
Current liabilities	$ 395,318	$ -	$ 51,101,772	$ 24,344	$ 50,000	$ 29,634
Noncurrent liabilities	33,982,052	17,715	34,494,152	19,327,422	-	-
Equity	2,447,451	393,725	51,103,883	2,582,090	287,791	370,939
	$ 36,824,821	$ 411,440	$ 136,699,807	$ 21,933,856	$ 337,791	$ 400,573
Equity based on estimated value at December 31, 2001	$ 2,500,000	$ 394,000	$ 117,113,000	$ 17,434,000	$ 900,000	$ 1,564,000
Summary of Operating Results:						
Total Revenues	$ 89,250,489	$ -	$ 20,087,003	$ 3,680,023	$ 458,280	$ 771,698
Operating expenses	84,361,646	106,001	1,750,565	1,074,694	264,138	516,374
Depreciation	185,782	-	2,200,088	480,276	20,278	38,035
Interest	1,723,510	274	6,418,885	912,393	5,929	-
Total Expenses:	86,270,938	106,275	10,369,538	2,467,363	290,345	554,409
Net Income	$ 2,979,551	($ 106,275)	$ 9,717,465	$ 1,212,660	$ 167,935	$ 217,289
Summary of Marvin L. Oates' equity in net assets:						
Ownership Percentage	10.00%	10.00%	75.00%	50.00%	30.00%	22.50%
Investment in Partnerships	$250,000	$39,000	$88,354,000	$8,717,000	$270,000	$352,000